Khan v Garg

2023 NY Slip Op 34835(U)

May 9, 2024

Supreme Court, New York County

Docket Number: Index No. 652334/2013

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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RAZA KHAN,

Plaintiff,

- v -

VISHAL GARG, EDUCATION INVESTMENT FINANCE CORPORATION, 1/0 CAPITAL LLC, and EMBARK HOLDCO I, LLC,

Defendants.

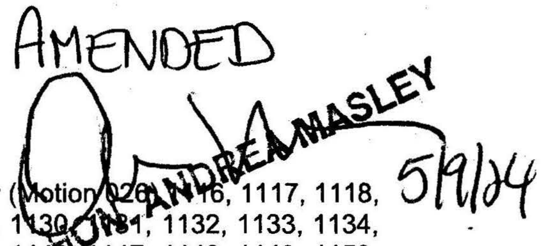
---X

INDEX NO. 652334/2013

MOTION DATE

MOTION SEQ. NO. 026

DECISION + ORDER ON MOTION



HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 026) 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1219, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1342

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, it is

Childhood friends, and serially successful entrepreneurs, defendant Vishal Garg and plaintiff Raza Khan parted ways in 2012. The saga of their business divorce is set forth in *Embark Corp. v Khan*, (Index No. 652801/2013, NYSCEF 684, Decision After Trial), one of their many legal progenies and will not be repeated here.

Defendants Garg, Education Investment Finance Corporation (EIFC), Embark Holdco I, LLC (Embark) and 1/0 Capital LLC (Capital) move pursuant to CPLR 3212 for summary judgment on seven of Khan's fiduciary duty claims (Count II, Subcounts (iv), (v), (vii), (x), (xi), (xiv) and (xv), tortious interference claim (Count V), and claim for

failure to execute corporate paperwork (Count VI).[1] Defendants also seek summary judgment on Garg's counterclaim for conversion (Count II).[2]

In the First Amended Complaint (FAC), plaintiff asserts claims for corporate deadlock of EIFC, conversion of EIFC assets, fraud, tortious interference of contract, failure to execute corporate documents, conversion,[3] unjust enrichment, accounting and thirteen[4] breaches of fiduciary duty, including: (i) converting moneys belonging to EIFC by improperly wiring funds from EIFC bank accounts into Garg's personal account(s); (ii) falsifying EIFC financial records; (iii) failing to file tax returns for EIFC since 2009; (iv) unilaterally terminating Phoenix Real Estate Solutions Ltd. (PRES)'s service contract with EIFC subsidiary Activity Special Advisory Services, LLC (ASAS);[5] (v) diverting PRES's service contract with EIFC subsidiary ASAS to defendant Capital for Garg's personal benefit and inducing former EIFC employees Mingsung Tang and Ziggy Jonsson to violate their non-competition agreements with EIFC and to become employed by defendant Capital (or some other legal entity associated with Capital); (vi) failing to assign the asset purchases of the Senior Secured Term Note to EIFC; (vii)

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[1] Plaintiff consents to dismissal of the corporate paperwork claim. (NYSCEF 1343, tr 72:4-7.)

[2] The court thanks the parties for their patience. The court also reminds the parties that Part 48 Procedures require the parties to notify the court by email when the parties file a transcript in NYSCEF at which point the court marks the motion submitted. Had the parties done so here, the court would have marked the motion submitted before January 2022, when the court happened upon the transcript in NYSCEF. With hundreds of cases on its docket, some of which have over 1,300 documents filed, the court cannot know when a transcript is filed in NYSCEF in a particular case unless the parties inform the court.

[3] All claims were dismissed against Embark except conversion. (NYSCEF 360, May 30, 2018 Decision at 8.)

[4] There is no (xiii) in the FAC.

[5] ASAS is defined in the FAC ¶ 4.

causing PRES not to pay $1,040,000 owed to ASAS/EIFC; (viii) using EIFC's funds to benefit MRU Lending; (ix) improperly seizing EIFC equipment on June 24, 2013; (x) unilaterally settling EIFC's claims against PRES and Embark for the benefit of PRES and Embark and detriment to EIFC; (xi) subverting the PRES arbitration; (xii) amending EIFC's tax returns with false financial information; (xiv) failing to enforce EIFC's legal and contractual rights with Tang and Jonsson; and (xv) conspiring with Tang and Jonsson, and others, to misappropriate EIFC's intellectual and other property and assets. (NYSCEF 335, FAC ¶ 158.)

Defendants assert counterclaims for breach of fiduciary duty, conversion, and corporate waste and mismanagement against Khan. (NYSCEF 334, First Amended Counterclaims.)

Plaintiff's motion to amend was denied. (NYSCEF 1346, Jan. 16, 2023 decision.)

Discovery is complete.

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists. (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 (1st Dept, 1987)*; see generally* CPLR 3212.) Initially, "the proponent of a summary judgment motion 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] [citations omitted].) If the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial. (*Id.*)

NYSCEF DOC. NO. 1349 RECEIVED NYSCEF: 04/13/2023

Release

First, defendants argue that the release in the 2015 arbitration settlement agreement bars eight claims here. In 2014, EIFC's subsidiary ASAS initiated the arbitration against PRES, a Garg-affiliated company, alleging that PRES had stolen business from EIFC, poached EIFC employees, and stolen EIFC's IP. (NYSCEF 279, Demand for Arbitration.) The IP consisted of software designed to analyze Residential Mortgage-Backed Securities, and certain data used in that software. (*Id.* ¶ 27.) Defendants contend that conduct to which Khan objected in the arbitration is the same conduct to which Khan objects here and which are the factual predicates for the fiduciary duty claims against Garg.

Parties to the arbitration settlement agreement include EIFC, ASAS, PRES, Jonsson, Tang, Phoenix Advisors and Managers Ltd., and Phoenix Advisors and Managers USA, LLC. (NYSCEF 277, June 11, 2015, Arbitration Settlement Agreement.) Defendants contend that the release is so broad that it also released agents, which includes Capital, an affiliate company of PRES, and includes Garg, who was an agent of both EIFC and PRES as Garg had an ownership interest in each entity. The settlement agreement provides:

> "[T]he Parties hereby fully, finally, and forever release, relinquish, acquit, settle, and discharge the other Parties-and each Party's affiliated companies, successors, agents and assigns-from any and all claims, cross-claims, debts, demands, rights, interests, actions, causes of action, or liabilities whatsoever (including without limitation direct or indirect claims or damages, interest, attorneys' fees, expert or consulting fees, and any other costs, expenses or liabilities whatsoever), whether known or unknown, accrued or unaccrued, direct, derivative or indirect, claimed or unclaimed, liquidated or unliquidated, matured or unmatured, at law or in equity, whether class and/or individual in nature, including but not limited to claims, counterclaims or defenses that have or may

> have been based on, arisen under or related to (i) the claims, defenses and potential counterclaims in the EIFC Arbitration, (ii) unpaid invoices, (iii) any intellectual property developed or utilized by any Party to this Agreement, and (iv) breach of contract, including, without limitation, any alleged breaches of contracts of employment and/or Workplace Policies and Principles of Employment (all such potential or actual claims, counterclaims or defenses under (i), (ii), (iii) and (iv), whether related to the EIFC Arbitration or not, are collectively defined herein as the "Claims"). The Parties acknowledge that the consideration they are receiving pursuant to this First Payment constitutes full and complete consideration for release of these claims. The Parties acknowledge that the foregoing release was separately bargained for and is a key element of the Agreement."

(NYSCEF 277, June 11, 2015 Settlement Agreement & Release ¶ 2 [emphasis added].)

Khan insists that the release did not release Garg from this 2013 action, which was pending at the time that the settlement agreement was executed in June 2015. Paragraph 7 of the settlement agreement provides:

> "This Agreement is solely for the benefit of the Parties, their affiliated companies, successors, and assigns, and there are no third-party beneficiaries of this Agreement. Nothing herein shall be construed to resolve or settle any disputes, claims or controversies by or among EIFC, PRES, Jonsson, Tang, PAM or PAM USA against any non-party to this Agreement. For the avoidance of doubt, it is not the intention of the Parties to release any individual who, at any time, was an officer, director or agent of any Party, from any claims, including, but not limited to, claims arising from or related to any actions which such individual may or may not have taken with respect to any Party."

In the original complaint, Khan alleged (I) corporate deadlock [not alleged in arbitration]; (II) breach of fiduciary duty based on six factual predicates: (i) "converting moneys belonging to EIFC by improperly wiring funds from EIFC bank accounts into [Garg's] personal account(s)" [same as (i) in FAC] [not alleged in arbitration]; (ii) "falsifying EIFC financial records" [same as (ii) in FAC] [not alleged in arbitration]; (iii) "failing to file tax returns for EIFC since 2009" [same as (iii) in FAC] [not alleged in arbitration]; (iv) "unilaterally terminating [PRES's] service contract with EIFC subsidiary ASAS" [same as (iv) in FAC] [alleged in arbitration § D]; (v) "failing to assign the asset

purchases of the Senior Secured Term Note of June 12, 2009 to EIFC" [same as (vi) in FAC] [not alleged in arbitration]; and (vi) "improperly seizing EIFC equipment on June 24, 2013" [same as (ix) in FAC] [not alleged in arbitration];" (III) conversion; and (VI) fraud. (NYSCEF 1, July 2, 2013 Summons & Complaint; NYSCEF 279, Demand for Arbitration.)

The court finds that paragraph 2 of the settlement agreement, which clearly releases defendants, and paragraph 7 conflict. Indeed, in its October 4, 2019 decision, resolving various discovery disputes, the court permitted Khan to "pursu[e] certain discovery . . . in connection with, at least, plaintiff's direct breach of fiduciary duty claims," against Garg. (NYSCEF 826, October 4, 2019, Decision at 10.) The Court did so although Justice Oing denied plaintiff's motion to reject EIFC's settlement of its actions, on the grounds that Khan may still have "direct" claims, even though "the settlement agreements release EIFC from any related claims and preclude[]. . . the derivative fiduciary duty claim[] against Garg." (*Id.* at 10.[6]) However, the court must give effect to entire agreement, including paragraph 7. "[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect." (*Bijan Designer For Men, Inc. v Fireman's Fund Ins. Co.*, 264 AD2d 48, 53 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Port Auth. of N.Y. & N.J. v Brooklyn Union Gas Co.*, 179 AD3d 1106, 1109 [2d Dept 2020] [holding a "no third-party beneficiaries" clause inapplicable where contract otherwise showed an intent to benefit certain third-parties] [quoting *Nomura Home*

[6] Khan's reliance on this discovery decision for the proposition that the court has decided that the release does not bar claims against Garg is either misinformed or misleading.

NYSCEF DOC. NO. 1349 RECEIVED NYSCEF: 04/13/2023

Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc., 30 NY3d 572, 581 [2017]). Defendants assert the "correct reading" of Paragraph 7 "(which eliminates the internal inconsistency) is that it clarifies that the settlement would not resolve other, then-ongoing lawsuits. ...Paragraph 7's statement that it did not 'resolve' or 'settle' claims against officers plainly refers only to existing disputes--otherwise it would also include unknown claims, as Paragraph 2 does. This interpretation also explains why the clause carving out officers, directors or agents follows the sentence about 'disputes, claims or controversies,' and is styled as a clarification of that sentence ('for the avoidance of doubt . . .')." (NYSCEF 1329, defendants reply memorandum at 19.)

Clearly paragraph 7 carves out this action from the release to the extent that there are claims in this action that were not raised in the arbitration. The court rejects Khan's argument that breach of fiduciary duty was not alleged in the arbitration. (NYSCEF 1317, plaintiff's opposition at 20-21.) Paragraph 2 of the release would cover Garg's alleged breach of fiduciary duty claims even though there are no breach of fiduciary duty claims in the arbitration. The facts underlying Khan's fiduciary claims here are the same series of events asserted in the arbitration. (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981] ["[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy]."). Otherwise, Khan fails to address collateral estoppel. Collateral estoppel precludes Khan "from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." (*Bauhouse Grp. I, Inc. v Kalikow*, 190

AD3d 401 [1st Dept 2021].) Therefore, the FAC's subcount (iv) unilaterally terminating Phoenix's service contract with EIFC subsidiary ASAS [same as (iv) in first-filed complaint (NYSCEF 1)] is dismissed because it was alleged in arbitration § D at 11-12 and settled. Likewise, the factual predicates for the PRES claims in the FAC's subcounts (v), (vii), (x) and the employment claims in (xiv) and (xv) were alleged in the arbitration and settled. Therefore, the fiduciary duty claim is dismissed to the extent that it is based on those factual predicates.[7]

Breach of Fiduciary Duty Claims

Subcounts (v), (xiv), and (xv) are dismissed for the additional reason that there is no enforceable agreement with which to be breached or interfered. EIFC's noncompete provides:

> "During Candidate's engagement with Company and for twelve months thereafter, Candidate shall not, directly or indirectly . . . in any capacity . . . compete with Company anywhere in North America, Europe, Asia or any other location where Company's product offering, service offering or merchandise is available for transacting business . . . in: (1) Company's core business of [] providing origination, lending, portfolio management, trading, and servicing of consumer loans or securities referenced by consumer loans and . . . enrollment management services to colleges, universities, scholarship providers and other academic institutions or programs, provision of a college selection and admissions portal, generation and sale of leads to various third party . . . (2) any other line of business in which Company is or was engaged at any time during Candidate's engagement with Company . . . or (3) any other line of business into which Company, during Candidate's engagement with Company, formed an intention to enter . . ."

(NYSCEF 1141, EIFC Workplace Policies at 9.)

[7] Though not determinative, the court notes the inconsistency in Khan's argument that Garg does not benefit from the release which is contrary to Khan's theory of the case that Garg settled the cases for his own self-interest.

The noncompete is unenforceable as impermissibly broad. (*BDO Seidman v Hirshberg*, 93 NY2d 382 [1999].) Moreover, EIFC's employee handbook does not create an employment agreement. (*Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312 [2001].)

Khan asserts that Garg breached his fiduciary duty to EIFC by entering in two settlement agreements. Khan raised these objections and Justice Oing rejected them. (NYSCEF 316, August 10, 2016 Decision at 7.) Therefore, subcounts (x) and (xi) are dismissed for this additional reason.

. Finally, Khan asserts a claim for misappropriation of EIFC's intellectual property and other property and assets as a predicate for breach of fiduciary duty. (NYSCEF 335, FAC [iv].) The court agrees with Khan that whether one company is using the proprietary information of another company is a quintessential issue of fact, but on a motion for summary judgment, plaintiff must establish issues of fact with evidence. (*Alvarez*, 68 NY2d at 324.) To state a cause of action for IP conversion, a plaintiff must plead that "(1) [it] had legal ownership . . . to specific identifiable personal property, and (2) defendant exercised unauthorized dominion over the property to the exclusion of the plaintiff's rights." (*Aetna Cas. & Sur. Co. v Glass*, 75 AD2d 786 [1st Dep't 1980].) The court also agrees with Khan that trade secrets include data, designs, architecture for website's, and, mobile apps, contracts, client lists, pricing, etcetera. However, Khan fails to identify the property that Garg, or his affiliated companies at his direction, misappropriated. A misappropriation claim is defective "in the absence of any evidence that [Defendants] copied or used [Plaintiff's] software." (*Falconwood Corp. v In-Touch Techs.*, Ltd., 227 AD2d 215, 216 [1st Dept 1996].) Khan's expert Peter Vinella opines that Garg and Capital "misappropriated, misused, and improperly disclosed EIFC IP on

numerous occasions." (NYSCEF 1156, Vinella Report ¶¶ 188.) However, in support of his assertion Vinella offers that "Garg and Jonsson had the means, motive and opportunity to misappropriate, misuse, and improperly disclose EIFC." (*Id.* ¶¶ 193-196].) Access is not proof. (*Falconwood Corp. v In-Touch Techs.*, Ltd., 227 AD2d 215, 216 [1st Dep't 1996].) If mere knowledge of "the intricacies of a former employer's business" were enough to show theft, "those in charge of operations or specialists in certain aspects of an enterprise [would be] virtual hostages of their employers." (*Fareportal, Inc. v Ware*, 2018 N.Y. Slip Op. 32081[U] at 13, 2018 LEXIS 3633, at *15-16 [Sup Ct NY County 2018], quoting *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 309 [1976].) As further proof of theft, Khan asserts that when Garg and his companies began servicing PRES, after terminating EIFC's subsidiary, servicing "could have only been accomplished through Garg, Tang, and Jonsson's misappropriation of EIFC's confidential and proprietary information" (NYSCEF 1317, Plaintiff's MOL at 7.) Therefore, Khan's claim is entirely speculative and subcount (v) is dismissed for this additional reason.

Tortious Interference (Count V)

Khan alleges that "180. Defendant GARG and Defendant [Capital] intentionally induced [PRES] to terminate its contract with ASAS and to divert the contract to Defendant [Capital]." This claim is dismissed as released against Garg as discussed above. As to Capital, the claim is dismissed too. Contrary to defendants' argument, an at-will contract can be interfered with. "Where contracts terminable at will have been involved, we have upheld complaints and recoveries in actions seeking damages for interference when the alleged means employed by the one interfering were wrongful, as

consisting of fraudulent representations, or threats or as in violation of a duty of fidelity owed to the plaintiff by the defendant by reason of a relation of confidence existing between them." (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980].) However, Capital owes no fiduciary duty to EIFC and there are no allegations of fraud or threats by Capital.

Counterclaim for Conversion

In the conversion counterclaim, defendants allege that

> "72. Khan improperly exercised unauthorized dominion over monies belonging to EIFC and improperly prohibited Garg, who at all relevant times remained a 50% shareholder, from having any access to the same or records regarding the same. Khan did this by, inter alia, using EIFC funds to fund multiple lawsuits against and investigations into wrongdoing by Garg in an effort to harm his estranged friend and business-partner.
>
> 73. Khan also has refused to reimburse Garg for charges he incurred on Garg's American Express card."

(NYSCEF 334, First Amended Counterclaims.) In addition to paragraph 73, in the background section of the counterclaims, defendants allege:

> 13. True to form, Khan has also borrowed money from Garg personally (for business or personal expenses), without ever returning it. Since 2009, Khan has incurred more than $36,000 in personal expenses on Garg's American Express card, including for meals, laundry, travel and other personal expenses. Much of that remains unreimbursed

(*Id.*) Paragraph 13 is repeated and realleged in the Conversion Count. "To prevail on a claim of conversion under New York law, a plaintiff must demonstrate that: (1) the property subject to conversion is a specific identifiable thing; (2) the plaintiff had ownership, possession, or control over the property before its conversion; and (3) the defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights." (*Trahan v Lazar,*

457 F Supp 3d 323, 356 [SD NY 2020] [citations and internal quotation marks omitted.]) "[Th]e amounts drawn on [plaintiff's] corporate credit card for [defendant's] personal use without reimbursement are similarly sufficiently identifiable for the claim to proceed." (*NYC St. Tree Consortium, Inc. v Eber-Schmid*, 2008 WL 11516553, at *8 [S.D.N.Y. Apr. 21, 2008].) Defendants have established that Khan owes defendants $28,319.75 and otherwise must await trial as to the balance of the $36,000 sought in the complaint. Khan asserts vague objections to defendants' detailed evidence and admits to personal charges which he has failed to reimburse. (NYSCEF 1160, Kahn tr 434:6-436:1; NYSCEF 1145, Nov. 7, 2013 email from Khan to EIFC's accountant.) While the card may be in the name of the corporate entity Iempower, a corporation owned by Kahn and Garg, the bills were paid by Garg or EIFC, not Khan, as Kahn admits. (NYSCEF 1277, Khan aff ¶69; NYSCEF 1161, Garg tr 112:12-21.) Khan's defense based on Garg's alleged misuse of the corporate American Express card is irrelevant to Khan's alleged unreimbursed personal charges. Likewise, Khan's attempt to change the subject to Garg's alleged withdrawal of corporate funds is irrelevant to whether Khan reimbursed his personal expenses charged to the corporate American Express card. Regardless of whether Garg or EIFC paid the American Express bills, Khan owes reimbursement to one of the defendants.

Damages

Finally, defendants seek dismissal of Khan's fiduciary duty claims (Count II, Subcounts (iv), (v), (vii), (x), (xi), (xiv) and (xv) and tortious interference claim (Count V), for failure to establish damages. In light of the dismissal of these claims and subcounts, it is unnecessary to address defendants' damages arguments.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and Khan's fiduciary duty claims (Count II, Subcounts (iv), (v), (vii), (x), (xi), (xiv) and (xv)), tortious interference claim (Count V) and, and the claim for failure to execute corporate paperwork (Count VI) are dismissed; and it is further

ORDERED that defendants' motion for summary judgment is granted on its conversion counterclaim and defendants shall have judgment for $28,319.75 with interest since July 12, 2013 (See NYSCEF 1314, last date of American Express Statements); and ~~it is further~~ the County Clerk shall enter judgment in favor of defendants and against plaintiff in the amount of $28,319.75 with interest at the statutory rate from July 12, 2013; and it is further

HON. ANDREA MASLEY 5/9/24

ORDERED that the balance of the action shall proceed to trial. The partis shall submit motions in limine within 60 days of the date of this order; otherwise waived. The parties shall contact the Part Clerk to schedule a trial scheduling conference. Parties are advised that the next available trial date is in February 2024.

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4/13/2023		ANDREA MASLEY, J.S.C.
DATE		

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