

**Richmond Global Compass Fund Mgt. GP, LLC v
Nascimento**

2024 NY Slip Op 30693(U)

March 4, 2024

Supreme Court, New York County

Docket Number: Index No. 654190/2021

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

The following e-filed documents, listed by NYSCEF document number (Motion 018) 288, 289, 290, 291, 292, 293, 303, 320

were read on this motion to/for

SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 020) 284, 285, 286, 287, 304, 321, 324

were read on this motion to/for

DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 021) 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 342, 345, 346, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362

were read on this motion to/for

QUASH SUBPOENA, FIX CONDITIONS

The following e-filed documents, listed by NYSCEF document number (Motion 022) 338, 339, 340, 341, 343, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375

were read on this motion to/for

QUASH SUBPOENA, FIX CONDITIONS

Upon the foregoing documents and for the reasons set forth below, the Plaintiff's motion for issuance of an open commission to depose Entoro Securities, LLC, (Mtn. Seq. No. 010) is granted as unopposed. The Plaintiffs' and the Defendants' motions to seal (Mtn. Seq. Nos. 011, 017, 018, 020) are denied because the names of actual or prospective Norbury investors are not confidential, nor is the information contained in the attorneys' correspondence. The Defendants' Motion to Compel (Mtn. Seq. No. 014) is granted solely to the extent set forth below. The Plaintiffs' motion to compel (Mtn. Seq. No. 015) is granted in its entirety. The Defendants' motion for a protective order (Mtn. Seq. No. 021) is granted to the extent set forth below. Finally, non-party Anderson Kill P.C.'s motion to quash (Mtn. Seq. No. 022) is granted.

I. The Plaintiff's is entitled to an Open Commission to depose Entoro (Mtn. Seq. No. 010)

The Plaintiffs' motion (Mtn. Seq. No 010) requesting an open commission to depose Entoro Securities, LLC, and to inspect documents in its possession, custody, or control, is granted as unopposed. The information sought is material and necessary to the Plaintiffs' claim that the

Defendants abruptly ended their employment with Plaintiffs, started a rival fund using the same strategy, and solicited certain of the same prospective customers as Plaintiffs. As such, the motion is granted.

II. The Sealing Motions are Denied (Mtn. Seq. Nos. 011, 017, 018, 020)

Motion sequence numbers 011 and 018, in which Defendants move to seal certain Letters of Request and communications between the parties' counsels, are identical and pertain to the same set of documents (NYSCEF Doc. Nos. 159, 163, 172, 174, 177, and 181). Both motions are denied. Under the circumstances of this case, the entity names contained in the Letters of Request (NYSCEF Doc. Nos. 159, 163) cannot properly be considered confidential. As discussed further below (Mtn. Seq. No. 15), the entities solicited and how they were solicited go to the heart of the Plaintiffs' claims, and the Defendants' privacy concerns are substantially outweighed by the public's interest in this information. As such, this branch of the motion is denied.

The attorneys' letters sought to be sealed (NYSCEF Doc. Nos. 172, 174, 177, and 181) do not contain any confidential information whatsoever. These letters do not discuss any proprietary business information or trade secrets sufficient to hold good cause exists to seal them as required under Part 216 of the Uniform Rules for the Trial Courts. The Defendants' argument that they seek to seal these documents "out of an abundance of caution" similarly fails to state good cause (NYSCEF Doc. Nos. 225 at 3; 289 at 3). As such, the motions are denied.

The Plaintiffs' motions to seal (Mtn. Seq. Nos. 017, 020) certain documents containing the names of actual or "prospective investors" are denied. None of these documents contain proprietary business information such that the privacy concerns outweigh the public's interest in disclosure.

III. Further Specificity of the Plaintiffs alleged Damages should be explored during Expert Discovery (Mtn. Seq. No. 14)

As an initial matter, the Court notes that the branch of the motion seeking to compel the Plaintiffs (i) to run certain searches has been resolved by the parties and (ii) to review documents responsive to Defendants' Request No. 44 has been resolved by the parties or is otherwise granted as unopposed (NYSCEF Doc. No. 165 at 6-22 and at 23 and NYSCEF Doc. No. 315 at 2, footnote 2). Thus, this branch of the motion is granted.

The Defendants also seek to compel Plaintiffs to supplement their response to Defendants' Interrogatory No. 15 and provide greater specificity as to, among other things, the \$8 million in damages claimed by the Plaintiffs. In the opposition papers, the Plaintiffs indicate that they have described to Defendants the categories of damages Plaintiffs will seek to recover and provided the information that they can provide before they have received certain outstanding discovery from the Defendants and before they and their expert has analyzed such data (NYSCEF Doc. No. 315 at 11). The position is entirely reasonable under the circumstances and to this extent the motion must be denied. However, to the extent that the Defendants seek clarity as to any lost profits relating to Peter Kellner, George Kellner (Peter Kellner's father), Amanda Hanes-Dale, and Warren Lowe, the Plaintiff shall provide greater specificity as to damages claimed relating to those four investors within 45 days of this Decision and Order.

IV. The Information in this Case should not be attorneys' eyes only (Mtn. Seq. No. 015)

The Plaintiffs' motion to compel discovery from the Defendants and to declassify certain information designated "Highly Confidential – Attorneys' Eyes Only" in Defendants' Amended and Supplemental Interrogatory responses (Mtn. Seq. No. 015) is granted. The claim in this case is rooted in whether the Defendants took and marketed the Plaintiffs' track record and proprietary information in setting up their competing fund, Norbury, and whether the Defendants breached a non-solicitation agreement. The discovery sought is not a source code, the formula for Coca-Cola or other proprietary confidential business information that would give the Plaintiff which is now out of business any competitive advantage. The fact that Peter Kellner may have indicated to his father that he is upset with the Decio Nascimento and asked his father not to recommend Mr. Nascimento does not require a different result. Nor does it matter that Mr. Kellner and an employee of Norbury had a heated exchange at a social club emanating from a question and answer session where Mr. Kellner made inquiry as to certain of the concerns that he has which form the basis for this lawsuit. He must be permitted to participate meaningfully in discovery as his input into analyzing the discovery information will be important in understanding whether any of the alleged harms actually occurred. To the extent that the Defendants express concern that Mr. Kellner may tortiously interfere with an existing or prospective business opportunity, should he do so, they may seek legal redress and may interpose a counterclaim if appropriate or may if appropriate start a separate plenary action. This speculative assertion is simply not a basis to limit his participation in meaningful discovery. Nor does it matter under the circumstances of this case that his father may have a fund which is in business. The communications provided to the Court (tr. 3.4.24) if anything undermine the

notion that Mr. Kellner's father, George Kellner, does whatever his son tells him to do. George Kellner is his own man. In any event, as noted above, if interference were to be committed, the Defendants are not without legal redress and can assert any appropriate causes of action if Messrs. Kellner violate New York State Law.

The Plaintiffs' First Request for documents relating to Norbury go to the heart of this litigation and the Defendants have an obligation to produce all documents within their custody or control. It is wholly irrelevant that Norbury itself was also subpoenaed. There simply is no authority for the proposition under New York Law that this relieves the Defendants of their discovery obligations. It is also wholly a separate issue as to whether Norbury may seek costs incurred in connection with any searches that it performed and the conflation of the two issues is entirely without merit.

As to certain discrete searches requested by Plaintiffs, the Plaintiffs indicated (tr. 3.4.24) that the Plaintiffs are withdrawing this request without prejudice at this time because the parties have made substantial progress in resolving this issue.

The Plaintiffs' request that the Defendants identify "prospective investors" is also appropriate. As with most things, the devil is in the details. "Prospective investors" means investors which the Defendant contacted directly or indirectly to induce them to invest. This information is critically important in permitting the Plaintiffs to complete discovery as to its claims that the Defendants' solicited potential investors in violation of the non-solicitation agreement and otherwise used the Plaintiffs' proprietary information in doing so. The Defendants must produce

this information, identifying the entities by their legal name, and cannot unilaterally impose a limit on discovery by producing the only names of those entities with “whom there was a reasonable expectation that was tangibly communicated to Defendants or Norbury” that such entities would invest with Norbury (NYSCEF Doc. No. 195 at 15). Such limitation is without merit under New York Law and appears to seek to limit or avoid production of material and necessary information to the claims asserted in this case. Thus, Defendants shall produce this information within 45 days of this Decision and Order.

As discussed above, the Defendants must also declassify the investor names they have thus far provided pursuant to Plaintiffs’ Interrogatories Nos. 2 and 4.

V. Jeremy Deutsch shall provide an updated affirmation (Mtn. Seq. No. 021)

The attorney-client privilege is sacrosanct. The fact that certain potential clients or third parties may have subsequently discussed certain advice given by a lawyer who may be Mr. Deutsch does not necessarily mean that the attorney-client privilege has been waived or that Mr. Deutsch must make a full disclosure of all documents in his possession relevant to the issues in this case. This is not the law. Among other things, at issue are (i) whether those individuals are even referring to Mr. Deutsch and (ii) whether Mr. Deutsch provided documents or communications to third parties to whom the attorney-client privilege did not extend. Mr. Deutsch’s affirmation does not resolve this and certain other issues discussed (tr. 3.4.24). As to the first question, inasmuch as Mr. Deutsch is not a party to those text messages and is not identified in those text

messages, his affirmation could not address that issue and the record before the Court does not establish that those individuals are in fact referring to Mr. Deutsch. As to the second question, Mr. Deutsch shall supplement his affirmation to indicate that he reviewed his files and all of his email accounts including any personal email account, and not just his “attorney” emails and his text messages and that he shall indicate in his supplemental affirmation that he has produced all non-privileged documents and communications in his custody and control and otherwise disclosed any non-privileged communications relevant to this lawsuit. As discussed (tr. 3.4.24), to the extent that Mr. Deutsch asserts privilege as to any non-parties in this litigation, he shall identify those individuals or companies and set forth the basis upon which such privilege extends. If necessary and if challenged by the Plaintiffs, the Court may review any such documents or communications in camera. This updated affirmation shall be provided within 45 days of this Decision and Order. If the Plaintiffs are dissatisfied with Mr. Deutsch’s supplemental affidavit, the Plaintiff shall email Part 53 and the Court will arrange a conference and issue a supplemental order if appropriate.

VI. Non-Party Anderson Kill P.C.’s Motion to Quash is Granted (Mtn. Seq. No. 022)

Non-party Anderson Kill P.C.’s motion to quash the subpoena duces tecum served on it (Mtn. Seq. No. 022) is granted. Anderson Kill indicates that it simply no longer has any of the relevant files as Mr. Deutsch took any such files with him to his new firm, Cozen O’Connor. This is sufficient. Thus, and the motion is granted and the subpoena is quashed.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion requesting an open commission (Mtn. Seq. No. 010) is granted; and it is further

ORDERED that Defendants' motions to seal (Mtn. Seq. Nos. 011, 018) are denied; and it is further

ORDERED that Defendants' motion to compel (Mtn. Seq. 014) is granted solely to the extent set forth herein; and it is further

ORDERED that Plaintiffs' motion to compel (Mtn. Seq. No. 015) is granted; and it is further

ORDERED that Plaintiffs' motions to seal (Mtn. Seq. Nos. 017, 020) are denied; and it is further

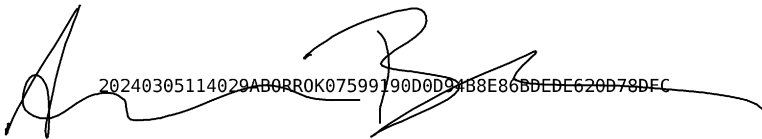
ORDERED that Defendants' motion for a protective order (Mtn. Seq. No. 021) is granted to the extent set forth herein; and it is further

ORDERED that non-party Anderson Kill, P.C.'s motion to quash (Mtn. Seq. No. 022) is granted; and it is further

ORDERED that Mr. Deutsch shall submit a supplemental affidavit detailing the information indicated above, within 45 days from this issuance of this Order; and it is further

ORDERED that Plaintiffs shall supplement their response to Interrogatory No. 15 as indicated above, within 45 days from the issuance of this Order.

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3/4/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE