SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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MANORHAVEN CAPITAL LLC

Plaintiff,

- v -

MARC J. BERN & PARTNERS, LLP,

Defendant.

INDEX NO.	654869/2022
MOTION DATE	01/23/2023, 05/24/2023, 06/16/2023, 08/04/2023, 08/04/2023, 09/13/2023, 09/27/2023, 09/27/2023, 10/05/2023, 11/08/2023
MOTION SEQ. NO.	001 002 004 005 006 007 008 008 009 010

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 33, 34, 35, 36

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 38

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 39, 40, 41, 42, 43, 44

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 70, 71, 72, 135

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 114, 115, 116, 134
were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 133, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145
were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 133, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145
were read on this motion to/for SUBPOENA.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 129, 130, 131, 132
were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 146, 147, 148, 149
were read on this motion to/for SEAL.

Upon the foregoing documents and for the reasons set forth on the record (tr. 3.4.24), Marc J. Bern & Partners, LLP (**Bern**)'s motion to dismiss (Mtn. Seq. No. 001) is denied. Simply put, Bern's thinly veiled attempt to urge this Court to put form over substance in further attempt to avoid paying Manorhaven Capital LLC (**Manorhaven**) the two percent fee Bern agreed to pay them for loan proceeds procured from D.E. Shaw (**Shaw**) during the Agreement Period (hereinafter defined) because Manorhaven did not label certain communications and other documents that it delivered to Bern during the Agreement Period (hereinafter defined) with the magic words "Schedule 1" on them fails.

To wit, Bern entered into a brokerage litigation funding agreement with Manorhaven, dated August 16, 2021 (the **Agreement**; NYSCEF Doc. No. 10). Pursuant to the Agreement, Bern agreed to pay Manorhaven a two percent fee based on "the amounts of loan proceeds actually received by the Company from the Transaction" during the agreement period, which lasted from August 16, 2021, until December 31, 2021, and included a "tail period" which expired on

December 31, 2022 (collectively, the **Agreement Period**; *id.* ¶¶3, 5). The Agreement itself provides that the potential funding sources and communications would be attached to the Agreement as "Schedule 1" which Schedule 1 would be updated continuously and from time to time (*id.* ¶5). When the Agreement was first executed, Schedule 1 attached to the Agreement was blank.

However, and significantly, the record before the Court firmly establishes that **subsequently** (i) Manorhaven disclosed to Bern that it was in discussions with many potential funders (collectively, the **Potential Funders**) including Shaw during the Agreement Period (Complaint ¶11; NYSCEF Doc. No. 33 [the **Schedule 1 Initial Disclosure**]), (ii) Manorhaven discussed and entered into substantial negotiations with Shaw on behalf of Bern during the Agreement Period (*see, e.g.*, NYSCEF Doc. Nos. 33 and 35-36), (iii) Manorhaven communicated to Bern that Shaw had passed on the opportunity such that there could be no further updates to Bern about Shaw (NYSCEF Doc. No. 36), (iv) Bern understood that Manorhaven had entered into discussions with the Potential Funders including Shaw (NYSCEF Doc. Nos. 19 and 33-36), accepted the prior communications including the Schedule 1 Initial Disclosure as sufficiently complying with the Agreement (notwithstanding that they were not labeled with the words "Schedule 1") and apparently falsely told Manorhaven that he secured financing from "a source that was not one that [Manorhaven] contacted"[1] in attempt to avoid paying his obligation to Manorhaven and (v) a deal was ultimately closed with Shaw, as alleged, during the Agreement Period (Complaint *id.* ¶¶15-18).

[1] Bern does not say in his communication that it never received a Schedule 1 list from Manorhaven. Instead, Bern says that the source was not one that Manorhaven contacted. This matters because it evinces Bern's acceptance of the prior communications as compliant with the Agreement's requirement that it be on "Schedule 1."

As such, Bern is not entitled to dismissal at the stage based on its argument that (i) Manorhaven failed to use the words "Schedule 1" update in their communications when they (a) sent the Schedule 1 Initial Disclosure to Bern on September 22, 2021 and (b) communicated that Shaw passed on the deal on November 22, 2021 (NYSCEF Doc. No. 36) (which it ultimately did) or (ii) that Manhorhaven failed to continually communicate with Shaw and update Bern on the status of these communications *after* Shaw indicated it would not do the deal with Bern (although it ultimately did). Indeed, this "alleged failure of condition" may well have been induced by Bern to avoid paying Manorhaven and to negotiate a better deal with Shaw. In any event, these allegations, taken as true, are sufficient to state a claim for breach of contract (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]) and Bern's strained interpretation of the facts alleged would in effect defeat both defeat the purpose of the Agreement and otherwise be inconsistent with the parties conduct resulting in substantial forfeiture for Manorhaven (*see Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 692-95 [1995]; *Danco Elec. Contractors, Inc. v Dormitory Auth. of State*, 162 AD3d 412, 413 [1st Dept 2018]). Thus, the motion to dismiss is denied.

Manorhaven's motion to compel production (Mtn. Seq. No. 005) is granted to the extent that Bern shall produce unredacted non-privileged documents in accord with the ESI protocol and confidentiality agreements (NYSCEF Doc. Nos. 26 & 37) and without the imposition of improper redactions within 30 days of this Decision and Order. By way of example, the credit agreement executed between Shaw and Bern (NYSCEF Doc. No. 62), which is at the heart of this case, was produced with significant redactions of definitions, entire contract sections and

their headings (*see, e.g., id*. at 19-20, 34-37). The redacted information is not privileged and is material and necessary to the prosecution of the claims in this case. Indeed, it may well demonstrate that terms were negotiated in contemplation of avoidance of the fees allegedly due Manorhaven. Thus, the credit agreement and other relevant non-privileged documents must be produced within 30 days and without such redactions. Inasmuch as Manorhaven indicated that certain of the transaction documents could be produced on an attorneys' eyes and for expert discovery only, the production as to these documents shall be done solely on that basis. For the avoidance of doubt, Bern shall produce a privilege log as to any documents not produced identifying the basis for the assertion of privilege.

Bern may however designate any witness who has knowledge of the topics noticed by Manorhaven as its designated Rule 11(f) witness for deposition to be conducted within 60 days of this Decision and Order. If the witness fails to have sufficient knowledge, Manorhaven may move by order to show cause for an additional 11(f) deposition and may seek costs both in having to bring the order to show cause and also in conducting the initial deposition. To the extent however that Marc Bern may have unique knowledge, this is not an 11(f) deposition, and Mr. Bern shall attend a deposition within 60 days of this Decision and Order as to topics within his unique knowledge. The branch of Manorhaven's motion seeking sanctions and fees is denied without prejudice.

The motion to quash a subpoena (Mtn. Seq. No. 008) is denied. Under New York law, a party seeking a protective order bears the initial burden of showing either that the discovery sought is irrelevant or that it is obvious the process will not lead to legitimate discovery (*Gen. Ins. v*

Piquion, 211 AD3d 634, 635 [1st Dept 2022]). Bern's assertion that portions of the information sought to be discussed at Shaw's deposition are available from Manorhaven fails. Manorhaven is entitled to understand the basis upon which Shaw decided to move forward with a deal with Bern when Shaw had previously told Manorhaven that the deal with Bern was not for them. Bern is also not correct that the subpoena is overbroad because the subpoena has certain of Shaw's fund names on it because those fund names do not appear on Schedule 1 or any prior communications to Bern and not just the generic name "D.E. Shaw". These entities are purported to be the Shaw funds which may have funded the loan or a portion of the loan obtained from Shaw. Finally, the Court notes that the noticed topics are not overbroad and are otherwise relevant to the issues in this case, including discussions between Shaw and Bern regarding the Credit Agreement entered into during the Agreement Period, and potentially whether a fee would be due to Manorhaven or whether it could be circumvented. The Court notes that the parties do not dispute that Shaw itself has not moved for relief of any sort in connection with the instant subpoena and Bern does not assert (i) that it has a proprietary interest in the subject documents or (ii) that the documents involve privileged communications (*Matter of Radio Drama Network, Inc.*, 214 AD3d 461, 463 [1st Dept 2023]). As such, the motion is denied.

The sealing motions (Mtn. Seq. Nos. 002, 004, 006, 007, 009, 010) are denied. The parties simply fail to identify any potential good cause for sealing which would outweigh the substantial public interest in the capitalization of Bern where the parties do not dispute that a substantial amount of potential judgments/settlements are managed (22 NYCRR § 216.1[a]).

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied in its entirety; and it is further

ORDERED that the parties shall, within thirty days of the date of this order of the court, meet and confer as to appropriate confidentiality measures to be taken in respect of Bern's production of unredacted non-privileged documents; and it is further

ORDERED that Bern shall make a full documentary production, as set forth in this Decision and Order, within thirty days of the date of this order of the court; and it is further

ORDERED that Bern shall produce their Rule 11(f) witness for deposition within sixty days of the date of this Decision and Order; and it is further

ORDERED that the motions to seal are denied in their entirety; and it is further

ORDERED that the parties shall appear for a status conference via Microsoft Teams on April 11, 2024, at 12:30 pm at which time the parties shall confirm a final fact deposition schedule (names/dates).

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3/5/2024
DATE

ANDREW BORROK, J.S.C.

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