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

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3B ASSOCIATES LLC,3B GROUP, INC,

Plaintiff,

- v -

ECOMMISSION SOLUTIONS, LLC,

Defendant.

INDEX NO. 657537/2017

MOTION DATE 07/11/2025, 07/11/2025

MOTION SEQ. NO. 009 010

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 285, 286, 287, 288, 289, 290, 291, 292, 293, 295, 299, 300

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 283, 284, 294, 296, 303, 304

were read on this motion to/for PRECLUDE.

Upon the foregoing documents and for the reasons set forth on record (*tr*. 11.10.25), the motions (Mtn Seq. Nos. 009-010) are decided as set forth below.

THE RELEVANT FACTS AND CIRCUMSTANCES

Reference is made to a Decision and Order of the Appellate Division, First Department (NYSCEF Doc. No. 275; the **Appellate Decision**) dated March 31, 2023 pursuant to which, as relevant, the Appellate Division held that:

> There are, at a minimum, factual issues surrounding whether plaintiff 3B Associates LLC was the corporate successor-in-interest of plaintiff 3B Group, Inc., such that 3B Associates has standing to enforce the agreement between 3B Group and defendant as a matter of law (see *Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 478,481 [2d Dept 2017). The fact that 3B Group and 3B Associates retained the same principals is not dispositive (*see Fleet Natl. Bank u Impol Seval Aluminum Rolling Mill Inc.*, 192 AD3d 628, 631 [1st Dept

2021]). Nor did defendant definitively consent to 3B Associates becoming the successor of 3B Group, as there are facts in the record to support defendant's principal's position that he was unaware that 3B Group had dissolved or that 3B Associates had formed at the time he issued checks to 3B Associates in 2012 and 2013. His assertion that he issued those checks because he believed that 3B Associates was 3B Group's assumed name or was a d/b/a of 3B Group is sufficient to create a factual issue on this point.

There also remain factual issues as to whether plaintiffs performed their obligations under the agreement (*see e.g. Second Source Funding, LLC u Yellowstone Capital, LLC*, 144 AD3d 445, 445-446 [1st Dept 2016]). The agreement provides that it was entered into in "consideration of 3B's work, efforts and assistance regarding [defendant] and the development of [defendant's] business, the sufficiency and receipt of which is hereby acknowledged." However, the agreement does not specify the type of "work, efforts and assistance" that 3B Group was to perform, or whether the performance obligations were ongoing. Nor does the agreement provide that defendant was obligated to pay a profits interest to 3B Group in perpetuity. In addition, that there was a "significant conflict on a material issue between [plaintiffs' principal's] original deposition testimony and the correction on the errata sheet," raised a credibility issue with respect to the scope and duration of the agreement (*see e.g. Natale u Woodcock*, 35 AD3d 1128, 1129 [3d Dept 2006]; *see also Ashford v Tannenhauser*, 108 AD3d 735, 736-737 [2d Dept 2013]). The issue of whether the proceeds from defendant's settlement with nonparty Dell should have been included within the definition of "net profits" under the agreement presents another factual issue that cannot be resolved on this record.

(NYSCEF Doc. No. 275 at 1-3).

DISCUSSION

The purpose of an *in limine* motion is to prevent the use of "inadmissible, immaterial or prejudicial evidence" at trial (*State v Metz*, 241 AD2d 192, 198 [1st Dept 1998]; *Drago v Tishman Constr. Corp. of N.Y.*, 4 Misc3d 354, 359-60 [Sup Ct, NY Cnty 2004]).

I. The branch of the motion (Mtn. Seq. No. 9) seeking to preclude DX 3-4 and DX 7-12 is DENIED

As discussed above, the Appellate Division has held that there is a factual issue as to whether 3B Associates LLC is the successor-in-interest to 3B Group, Inc. such that it has standing to assert

the rights under the relevant agreement. The tax returns (DX 3-4 and DX 7-12) are unquestionably probative of this issue. As such, the branch of the motion seeking their preclusion is DENIED.

II. The branch of the motion (Mtn. Seq. No. 9) seeking to preclude 3B Group, Inc.'s bylaws (DX 21) is DENIED

The jury is entitled to understand what the bylaws of 3B Group, Inc.'s were in determining as a factual matter whether 3B Associates LLC is the successor-in-interest to that entity. As such, the branch of the motion seeking preclusion of DX 21 is DENIED.

III. The branch of the motion (Mtn. Seq. No. 9) seeking to preclude Jerald Behren's affidavits (DX 23, 58, 60 and 62) is DENIED

Mr. Behren was President or Vice-President of 3B Group, Inc. and the managing member and President of 3B Associates LLC. Simply put, his statements offered against those entities are not hearsay and can not be excluded on those grounds (CPLR 4549; *People v Caban*, 5 NY3d 143, 151 [2005]). As such, the branch of the motion seeking to preclude the admission of Mr. Behren's affidavits (DX 23, 58, 60 and 62) is DENIED.

IV. The branch of the motion (Mtn. Seq. No. 9) seeking to preclude certain emails (DX 25-26, 28, 63-65) and service contracts (DX 56 and 66) is DENIED

A. DX 25 is an email sent by Paul Hoffman, ECS's principal. It is not hearsay. It can not be offered for the purpose of showing a prior termination of the Agreement with ECS by 3B Group, Inc. or 3B Associates LLC. As discussed in a Decision and Order dated April 4, 2022, the Court dismissed the affirmative defense of prior termination. This is the law of

the case as this portion of the April 4, 2022 Decision and Order of this Court was not modified.

B. DX 26 and 28 are versions of an email chain between Mr. Hoffman and 3B Group, Inc.'s prior counsel David Warmflash concerning a search for a copy of an agreement between ECS and its customer. As discussed, a proper foundation for admission is required for its admission. Absent proper foundation, DX26 and DX 28 are not admissible.

C. DX 32 is an email chain between Messrs. Behrens and Hoffman concerning scheduling a meeting as to an unspecified subject. There is no relevance to this email as such the motion seeking its preclusion is GRANTED.

D. DX 63 is an email chain between Barry Liben, one of the owners of 3B Group, Inc., and certain others, discussing ECS's lawsuits against Dell and another entity called CTS. As discussed, a proper foundation for admission is required for admission including that 3B had continuing obligations under the agreement, that at the relevant time Travel Leaders was an affiliate and that those support obligations under the agreement with 3B included requiring its affiliates to continue to engage with ECS.

E. DX 64 and 65 are versions of an alleged telephone call from Dell to a third party regarding the termination of Dell's relationship with ECS. As discussed, a proper foundation for admission is required for admission including that 3B had continuing obligations under the agreement, that at the relevant time Travel Leaders was an affiliate and that those support obligations under the agreement with 3B included requiring its affiliates to continue to engage with ECS.

F. DX 56 is a 2009 service contract with Travel Leaders. As discussed, a proper foundation for admission is required for admission including that 3B had continuing obligations

under the agreement, that at the relevant time Travel Leaders was an affiliate and that those support obligations under the agreement with 3B included requiring its affiliates to continue to engage with ECS.

G. DX 66 is a 2015 service agreement between Travel Leaders and CTS Systems signed by Liben on behalf of Travel Leaders. As discussed, a proper foundation for admission is required for admission including that 3B had continuing obligations under the agreement, that at the relevant time Travel Leaders was an affiliate and that those support obligations under the agreement with 3B included requiring its affiliates to continue to engage with ECS.

V. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude the introduction of evidence of the fraudulent conveyance lawsuit and other evidence of the Hoffmans' personal finances is GRANTED

Other than Mr. Hoffman's salary, which is relevant to amounts potentially owed, none of the other information is relevant to any issue in this case (*3B Assoc., LLC v. eCommission Solutions, LLC*, 226 AD.3d 527, 209 NYS.3d 373 [1st Dep't April 28, 2024]). Thus, the branch of the motion seeking their preclusion is GRANTED except as to evidence of Mr. Hoffman's salary.

VI. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude statements made by Barry Liben is GRANTED

By stipulation (NYSCEF Doc. No. 45), the parties agreed that "Defendant agrees to forego Barry Liben's dep. and Plaintiff agrees to not submit any affidavit testimony or call him as a witness, provided that if Plaintiff does intend to rehabilitate Mr. Liben, Defendant will have notice and opportunity to examine him." The Court notes that PX 59 is withdrawn. To the extent that the

motion seeks to preclude the introduction of hearsay, this portion of the motion is GRANTED. However ECS is not entitled to a blanket ruling that all statements attributed to Mr. Liben are in fact hearsay (some of those statements may not be hearsay) or should be precluded particularly given their intent to introduce other statements which they attribute to Mr. Liben.

VII. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude the introduction of the FASB, GAAP and ASC Documents (PX 78-86) is GRANTED

The accounting-related treatises, articles and reports are inadmissible hearsay. They are thus excluded. However, nothing prevents a witness from relying on them "if they are of a kind accepted in the profession as reliable in forming a professional opinion" (*Borden v Brady*, 92 AD2d 983, 984 [3d Dept 1983]). Thus, the branch of the motion seeking to preclude the introduction of PX 78-86 is GRANTED.

VIII. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude the communication that Mr. Hoffman forwarded from Willie Lynch (PX 16) is DENIED

PX 16 is not hearsay both because it is an adopted admission by Mr. Hoffman and also because it is being offered for the non-hearsay purpose of establishing notice of the restructuring of 3B Group, Inc. on the part of ECS (*Fleisher v City of New York*, 120 AD3d 1390, 1391 [2d Dept 2014]). Thus, the branch of the motion seeking preclusion of the introduction of PX 16 is DENIED.

IX. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude the introduction of the ECS 2012 Reconciliation Report (PX 19) is DENIED

PX 19 is being offered to show that ECS was aware that 3B Associates LLC was the successor-in-interest to 3B Group, Inc. because they paid them as the successor-in-interest to 3B Group, Inc. Thus, the branch of the motion seeking preclusion of it into evidence is DENIED.

X. The branch of the Motion (Mtn. Seq. No. 10) seeking to preclude the emails from Thomas Sparico (PX 25-26 and 29) is DENIED

PX 25-26 and 29 are offered not for their truth but for the fact that certain things were said – namely that (i) Mr. Sparico and ECS discussed "savings on 3B deal", (ii) that Mr. Sparico and Mr. Hoffman referred to the Agreement as a "key contract", and (iii) that BNM (Mr. Sparico's company) "got major recognition for the 'transformation' of ECS." Thus, the branch of the motion seeking their preclusion is DENIED.

XI. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude the introduction of a letter from the United State Government Internal Revenue Services (PX 43) is DENIED

CPLR 4518, the business records exception, permits the introduction of business records of government agencies (*Kelly v Wasserman*, 5 NY2d 425 [1959]). As such, there simply is no basis to preclude the introduction of this letter. Thus, the branch of the motion seeking its preclusion is DENIED.

XII. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude newspapers articles and press releases (PX 57, 60-62) which contain statements from Mr. Hoffman is DENIED

Statements made by Mr. Hoffman are party admissions. They are not hearsay. Thus, to the extent that PX 57, 60-62 contain statements from Mr. Hoffman, the motion must be denied as to

those statements and as to sufficient context as to those statements for proper consideration by the fact finder.

XIII. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude the admission of the demands made by 3B Group, Inc. (PX 64) is DENIED

It is not so that PX 64 is a settlement communication. Nor is it hearsay. PX 64 is a demand letter offered for its independent legal significance. As such, the branch of the motion seeking preclusion of PX 64 is DENIED.

XIV. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude communications from ECS's former employee to their accountant and communications between Mr. Hoffman and their accountant (PX 67-69) is DENIED

PX 67 is an email chain as to a former ECS employee (Arjun Nadkarni)'s 12.5% share of the sales price net of expenses of the 2017 sale of ECS – which proceeds 3B claims entitlement. Additionally, the Court notes that Mr. Hoffman does not deny that the sale occurred. These statements are party admissions that the sale occurred. Thus, the branch of the motion seeking to preclude PX 67 is DENIED.

PX 68 is not being offered for its truth. It is being offered as evidence that Mr. DiBianco, ECS's accountant, believed that the 2017 audit had in fact occurred. The branch of the motion seeking to preclude its introduction into evidence is thus denied. Additionally, because DiBianco is an agent of ECS, it is an admission and not hearsay in any event.

PX 69 is also not hearsay. It is offered as evidence that Mr. DiBianco believed that there had been a business sale such that there was nothing left to audit. In it he requests the business sale agreement. As such, the branch of the motion seeking its preclusion is DENIED.

XV. **The branch of the motion (Mtn. Seq. No. 10) seeking to preclude certain discovery materials and pleadings (PX 65, 70-77) is DENIED except as to PX 65 PX 71**

PX 65 is the affidavit of Helena Daras indicating that as of 2017 to June 2, 2021, Mr. Liben, David Buda, and Mr. Behrens did not have an ownership interest in Tzell Travel, LLC. Their ownership interests in Tzell Travel, LLC are not relevant in this case. Unless this becomes an issue, the motion is granted as to PX 65. PX 71 are business records of City National Bank as to the accounts of ECS. They appear to be discovery obtained in connection with the fraudulent transfer action. In any event, they do not appear to be relevant to any issue in this case. As such, unless the accounts become relevant to an issue in this case, the motion is granted as to PX 71.

PX 70 is the deposition transcript of Mr. Hoffman. CPLR 3117(a)(2) provides that "the deposition testimony of a party or of . . . any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given..." ECS does not make any specific objection as to any particular portion of the deposition transcript, as such they have waived any such objections (*R2 Inv. LDC v. Icahn*, 78 NYS.3d 13, 14 [1st Dept 2018]). In any event, the statements made by Mr. Hoffman are party admissions and not hearsay. As such, the branch of the motion seeking its preclusion is DENIED.

ECS's Responses to the plaintiffs' Requests for Admissions (PX 73), First Responses to Interrogatories (PX 74), First and Second Responses to the plaintiff's Requests for Production of Documents (PX 75-76), and Amended Responses to the plaintiff's RFP's (PX 77) may be used to the same extent as the depositions of a party under CPLR 3131 and are thus admissible. The contents of ECS's answer (PX 72) are admissions. Thus, the branch of the motion seeking the preclusion of PX 72-77 is DENIED.

XVI. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude the plaintiffs from exploring how the Dell Settlement proceeds should be treated is DENIED

As discussed above, the Appellate Decision held that there is a factual issue as to whether the proceeds from ECS's settlement with Dell should have been included within the definition of Net Profits under the Agreement. The Dell Settlement Agreement did not specify how the settlement amount was calculated or what if any portion should be attributed to goodwill (*see* PX 51 and PX 52). The accounting consultant letter relied upon by ECS is not a formal opinion and does not disclose the basis for the taking the position that it was reasonable for ECS to take that position. In fact, Mr. Hoffman's accountant indicated that he would file the return that way but explained that if this position was not accepted, Mr. Hoffman would need to refile his tax returns (PX 54 at 1). Additionally, it is not correct that even if it is a capital gain it would not be part of net profits under the Agreement (*Simon v. Hoey*, 88 F. Supp. 754, 759 [SDNY 1949]). As such, the branch of the motion seeking its preclusion is DENIED.

XVII. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude evidence of the nature of the Onyx transaction is DENIED

PX 57, 58 and 61 are admissions by Mr. Hoffman as to the sale of ECS to Pegasus/Onyx. There is no basis for preclusion. As such, the motion is DENIED.

XVIII. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude the introduction of the plaintiffs' up to date damages is DENIED

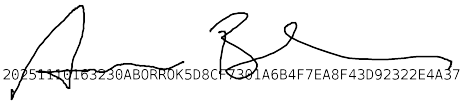
ECS fails to meet its burden in demonstrating why evidence of 3B's up to date damages should be precluded. As such, the motion is denied *(Van Wert. v Randall*, 950 N.Y.S.2d 726, 2012 WL 987610, at *2 [NY Sup. Ct. Mar. 26 2012]).

XIX. The branch of the motion (Mtn. Seq. No. 10) seeking to preclude 3B Associates LLC from claiming that it is 3B Group Inc.'s successor-in-interest is DENIED

As discussed above, the Appellate Division has held that there is an issue of fact as to whether 3B Associates LLC is the successor-in-interest to 3B Group Inc. As such, ECS is not entitled to an order precluding 3B from arguing that it is the successor-in-interest to 3B Group Inc. or that it lacks standing to enforce the Agreement as its successor-in-interest as a matter of law. Thus, the motion is DENIED. The Court notes that the fact that Mr. Behrens testified that the relationship is that of "assignor and assignee" does not change this result. It may well be that 3B Associates LLC is the successor-in-interest and that it is in fact the assignee of right title and interest of 3B Group Inc.'s rights.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby the motions (Mtn. Seq. No. 009 and 010) are decided as set forth above.



11/10/2025
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**