Informa Bus. Intelligence, Inc. v Reich
2022 NY Slip Op 32985(U)
September 6, 2022
Supreme Court, New York County
Docket Number: Index No. 657534/2019
Judge: Melissa Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA CRANE — PART 60M

Justice

---X

INFORMA BUSINESS INTELLIGENCE, INC.,

Plaintiff,

- v -

CHRISTOPHER REICH, ANDREA JOHNSON

Defendant.

---X

INDEX NO. 657534/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 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, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Defendants Christopher Reich ("Reich") and Andrea Johnson ("Johnson") move for summary judgment pursuant to CPLR 3212 dismissing Plaintiff Informa Business Intelligence, Inc.'s ("Informa") amended complaint. For the following reasons, defendants' motion is denied in part and granted in part.

BACKGROUND

Informa is a business that provides its clients with subscription services providing financial guidance for investors (NYSCEF Doc. No. 116, ¶ 3). One Informa business division, Informa Global Markets ("IGM"), "focuses on compiling, marketing and servicing Informa's financial market products," including "IGM Credit," "IGM Rates," "IGM FX," and "IGM EM" (NYSCEF Doc. No. 116, ¶ 3). Informa employed both Reich and Johnson in the IGM business division until November 25, 2019, when they resigned and joined Frank Sannella ("Sannella"). Sannella was the former CEO of the IGM division. Defendants allegedly assisted Sannella's creation of a competing

business, nonparty Boston Light Research ("BLR"), and a competing product, Credit Flow Research ("CFR"). Plaintiff alleges that Sannella previously encouraged a nonparty entity, 4Cast, to purchase the IGM business from Informa, but that transaction never materialized (NYSCEF Doc. No. 116, ¶ 7). Informa claims that Sannella created BLR as a "Plan B" to essentially acquire the IGM business "for free" in case the 4Cast deal did not close (NYSCEF Doc. No. 116, ¶ 11).

During their employment with Informa, Reich and Johnson maintained and updated charts containing information relating to bond markets. Some of those charts are available to Informa's clients for a subscription fee and some are internal and available only to employees of Informa (collectively, "Data Compilations") (NYSCEF Doc. No. 116, ¶¶ 16-18). The Data Compilations contain "years of aggregated market data reflecting bond issuances for thousands of companies and institutions, including information relating to transactions, debt issuances, coupon pricing information, bond prices, yield spreads, and other information" (NYSCEF Doc. No. 116, ¶ 16). The Data Compilations also include "Editorial Analysis," consisting of "comprehensive reports and stories completed by Informa analysts" (NYSCEF Doc. No. 116, ¶ 18). Clients access the subscription Data Compilations only through a paid subscription service, and those Data Compilations are password-protected. Customers are restricted from sharing the Data Compilations pursuant to their subscription agreements (NYSCEF Doc. No. 116, ¶ 31). Informa's internal Data Compilations are not available to customers. Informa's analysts use the internal charts to "respond to customer inquiries in a rapid and accurate manner based upon the information in those databases" (NYSCEF Doc. No. 116, ¶ 17).

In addition to the Data Compilations, Reich and Johnson maintained Informa's "Whisper List," which contains private contact information, including the phone numbers and email

addresses "not readily available to the public," of employees of banks and financial institutions (NYSCEF Doc. No. 116, ¶ 15).

After Reich and Johnson resigned from their positions at Informa on November 25, 2019, Informa filed the complaint in this action solely against Reich, alleging causes of action for breach of confidentiality, breach of fiduciary duty, misappropriation of trade secrets, tortious interference with prospective business advantage, unjust enrichment, and for an accounting (NYSCEF Doc. No. 1). Informa then amended the complaint to add Johnson as a defendant (NYSCEF Doc. Nos. 19, 30, 35).

Informa alleges that Sannella formed BLR to market the CFR product in direct competition with the IGM services, and that Reich and Johnson (1) utilized Informa time and resources to assist with the creation of BLR while still employed in the IGM division; and (2) misappropriated confidential information and trade secrets from Informa for the benefit of BLR. Reich and Johnson joined BLR after they left Informa's employ. Informa alleges that defendants misappropriated information that BLR is using to directly compete with Informa.

Reich and Johnson now move for summary judgment, arguing that the purportedly confidential information is not confidential because the Data Compilations are comprised of "plain vanilla" data that is publicly available to all financial reporting companies (NYSCEF Doc. No. 71, p. 3), and the Whisper List contains identities and contact information that can be "easily obtained through web searches, LinkedIn, Bloomberg and other publicly available sources" (NYSCEF Doc. No. 71, p. 4). Further, defendants contend that they "did not use any Informa resources in their efforts to assist to set up BLR while they were still at Informa and did so on their own time and with their own resources," and argue that "there is absolutely nothing wrong with an employee forming a competing business before he or she resigns" (NYSCEF Doc. No. 71, pp. 8, 15).

Informa responds that even if some of the underlying data contained within the Data Compilations is publicly available, the Data Compilations constitute confidential information because they contain "years of aggregated and carefully curated data covering numerous market events and data points" that provide customers with "immediate access to in-depth coverage" and Informa's analysts' editorial notes (NYSCEF Doc. No. 91, p. 3). Informa also highlights a litany of allegedly disloyal acts by Reich and Johnson while Informa still employed them (NYSCEF Doc. No. 91, pp. 4-5).

DISCUSSION

Summary judgment is a drastic remedy appropriate only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *DeCintio v Lawrence Hosp.*, 33 AD3d 329, 329 [1st Dept 2006]; *Orphan v Pilnik*, 66 AD3d 543, 544 [1st Dept 2009]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see Olan v Farrell Lines,* 64 NY2d 1092, 1093 [1985]; *Branda v MV Public Transp.*, Inc., 139 AD3d 636, 637 [1st Dept 2016]). If the party seeking summary judgment fails to meet their burden, the court must deny summary judgment, "regardless of the sufficiency of the opposition papers" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]).

Upon making an initial showing, the burden shifts to the party opposing the motion for summary judgment to rebut that prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). The court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]); *Kershaw v Hospital for Special Surgery*, 114

AD3d 75, 82 [1st Dept 2013]). Summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Ahmad v City of New York*, 129 AD3d 443, 444 [1st Dept 2015]).

1. <u>Breach of Confidentiality (First Cause of Action) and Misappropriation of Trade Secrets (Third Cause of Action)</u>

In the first cause of action, Informa asserts that defendants breached confidentiality policies contained in Informa's employee handbook. In the third cause of action, Informa asserts that defendants misappropriated trade secrets and proprietary materials (NYSCEF Doc. No. 35).

To establish a claim for misappropriation of trade secrets, the plaintiff must demonstrate that it "possessed a trade secret, and [] that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015]; *see also Meer Enterprises, LLC v Kocak*, 173 AD3d 629, 630 [1st Dept 2019]). To determine if information constitutes a trade secret, the court should consider a number of factors, including:

> "(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others"

(*Schroeder*, 133 AD3d at 27).

Here, defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing the third cause of action (misappropriation of trade secrets) because defendants' own motion papers show that there are material issues of fact relating to whether or not the Data Compilations or Whisper List constituted "trade secrets." Specifically, defendants append one of the Data Compilations to their motion. That chart displays thousands of rows of raw

data (NYSCEF Doc. No. 57) as well as a "Comments" column with descriptions of levels of growth for particular bonds (NYSCEF Doc. No. 57).

Even if some or most of this data is publicly accessible, the sheer volume in aggregation coupled with the comments providing analysis suggests that the Data Compilations may constitute trade secrets that would be of significant value to Informa and its customers, and would demand a substantial amount of time and effort to duplicate (*see Garvin GuyButler Corp. v Cown & Co.*, 588 NYS2d 56, 59 [Sup Ct, NY Cty Apr 30, 1992] [finding that while repo trade off dates were publicly available, the "extensive compilation by the brokerage firm of numerous off dates of different repo customers as a whole or collectively can create protected confidential information which, if imparted to a competitor, would result in the competitor gaining an unfair competitive advantage"] [emphasis added]).

Further, defendants have failed to meet their burden to establish as a matter of law that they did not owe a duty to Informa because they do not dispute—and cannot dispute—that they were employees of Informa. It is "axiomatic that an employee is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties" (*CBS Corp. v Dumsday*, 268 AD2d 350, 353 [1st Dept 2000] [citation and internal quotation marks omitted]).

Even if defendants had met their burden, Informa's submissions in opposition to the motion raise triable issues of fact. Informa provides evidence relating to the time spent aggregating the Data Compilations, the high value of the information, and the clear difficulty that duplicating the data would entail, all of which militates against granting summary judgment. Plaintiff submits the affidavit of Terry Wilby, Head of Business for IGM, who states that the Data Compilations constitute "**years** of aggregated market data" relating to "**thousands** of companies, with a variety

of data points including coupon pricing information, bond prices, and yield spreads (NYSCEF Doc. No. 116, ¶ 16 [emphasis added]). He estimates that it would take an analyst approximately three years to recreate the information in the Data Compilations (NYSCEF Doc. No. 116, ¶ 48). Wilby also asserts that the Whisper List is valuable to Informa and its competitors because it contains private contact information and "could be used as a proxy for an Informa client list" (NYSCEF Doc. No. 116, ¶ 15). Additionally, Informa's efforts to protect this information suggest that it is confidential. In his affidavit, Wilby explains that the Data Compilations are available exclusively through a subscription service and are password-protected, and that Informa's clients are restricted from sharing the information under their subscription agreements (NYSCEF Doc. No. 116, ¶ 31).

To the extent that defendants argue that the Data Compilations and Whisper List only contain publicly available information or that the access to the information was not sufficiently restricted, they merely raise issues to be explored at trial. For example, defendants attempt to distinguish *Garvin GuyButler Corp. v Cown & Co.* (588 NYS2d 56, 59 [Sup Ct, NY County 1992]) by arguing that *Garvin* requires that relevant information be "not accessible to [the industry] at large and would be difficult to acquire or duplicate" (NYSCEF Doc. No. 130, p. 5). However, *Garvin* reinforces the need for a fact finder to determine the difficulty entailed in compiling the data.

Nonetheless, defendants have met their prima facie burden to establish entitlement to summary judgment on the first cause of action (breach of confidentiality). Defendants submit a copy of the Informa employee handbook. The employee handbook demonstrates that the confidentiality policies in the handbook are non-binding. Specifically, the employee handbook cannot serve as the basis for a claim that defendants breached any confidentiality agreement

because the manual itself explicitly states that it "is not a contract of employment" (NYSCEF Doc. No. 68) (*see Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 317 [2001]; *Thomas v MasterCard Advisors, LLC*, 74 AD3d 464, 465 [1st Dept 2010]). Plaintiff's argument that defendants were "aware" of the confidentiality policies and "assented to be bound by them through continued employment" (NYSCEF Doc. No. 91, p. 19) does not negate the handbook's unambiguous disclaimer. Plaintiff fails to raise a triable issue of fact with regard to the first cause of action.

Accordingly, defendants are entitled to summary judgment dismissing the first cause of action for breach of the confidentiality policies, but the court denies the motion for summary judgment with regard to Informa's third cause of action for misappropriation of trade secrets. The duty of loyalty underpinning the misappropriation claim exists even where the employment relationship is at-will (*see e.g.*, *Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC*, 813 F Supp 2d 489, 521 [SDNY 2011]).

2. Breach of Fiduciary Duty (Second Cause of Action) and Accounting (Seventh Cause of Action)

To establish a claim for breach of fiduciary duty, a party must show "the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct" (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Defendants have failed to meet their burden to establish dismissal of the breach of fiduciary duty claim (second cause of action).

As set forth above, defendants failed to establish that they did not owe a fiduciary duty to Informa based on their status as employees. Additionally, defendants failed to show that there are no issues of fact regarding the confidential nature of the information that defendants allegedly misappropriated in breach of their fiduciary duties.

Even if defendants had demonstrated that they were entitled to summary judgment dismissing plaintiff's breach of fiduciary duty claim, Informa raises questions of fact that would preclude summary judgment. Informa submits evidence demonstrating that defendants may have engaged in conduct other than simply misappropriating proprietary information. For instance, Informa submits emails and text messages, some of which defendants sent during normal business hours, that appear to show efforts to form the competing business while defendants were still employed by Informa:

- On Tuesday, May 14, 2019, at 10:24 AM, Johnson texted Sannella regarding an individual named Bryce, asking if Sannella wanted her to "say something that might suggest he should go," and suggesting that Sannella speak with Bryce about "what might happen after the sale of the company" without "tipping [their] hand" (NYSCEF Doc. No. 114 at BLR000109-110).

- On Friday, May 24, 2019, in response to a 7:32 AM text, Reich texted Sannella regarding a meeting with an individual about a "sales support" position, stating "I think it went well" but that he was "a little weary" initially (NYSCEF Doc. No. 113 at BLR000640).

- On Monday, June 10, 2019, at approximately 4:30 PM, Sannella texted Reich stating that the "[d]eal appears dead" after "Informa backed out," going on to state "[w]e need to move" but "game on." Reich responded "k" (NYSCEF Doc. No. 113 at BLR000641-642).

- On Tuesday, August 27, 2019, at 1:31 PM, Johnson texted Sannella stating, "We should talk on ideas that might allow people to search stuff that is hard to search on Bloomberg" (NYSCEF Doc. No. 114 at BLR000111).

- On Wednesday, September 25, 2019, at 10:58 AM, Johnson emailed Sannella, copying Reich, with the subject "Some ideas – see attached" and attaching a document labeled "Mom Appointments" (NYSCEF Doc. No. 104). The attached document indicated, "Disguising this file under the name Mom Appointments!" and went on to discuss "menu stuff" including "Informa Finale," "Morning Call," "Cheat Sheet," and "Total for the Day" (NYSCEF Doc. No. 104).

- In late September-early October 2019, Johnson and Sannella texted with each other regarding a trip to Tampa where they would spend time on Friday "finalizing the site and authoring" (NYSCEF Doc. No. 114 at BLR000112-113).

- On November 24, 2019, between 9:23 AM and 1:18 PM, Sannella, Reich, and Johnson emailed using "creditflowresearch" email domains regarding how to present statistics on a new website, including emails between Johnson and Reich discussing how to limit access to statistics during trial periods (NYSCEF Doc. No. 109).

These communications raise material questions of fact regarding whether Johnson and Reich were planning their new business with Sannella **while on Informa's time**. While defendants

argue that at-will employees free of contractual restrictive covenants are "free to create a competing business prior to leaving their employer," they concede that this is only true "so long as they do not make improper use of their employer's time, facilities, or proprietary secrets" (NYSCEF Doc. No. 130 at 8 [citing *Island Sports Physical Therapy v Burns*, 84 AD3d 878, 878 [2d Dept 2011]]; *see also Don Buchwald & Assoc., Inc. v Marber-Rich*, 11 AD3d 277, 278-279 [1st Dept 2004] [reversing order granting summary judgment of breach of fiduciary duty claim, finding there were questions of fact regarding whether defendants "improperly used plaintiff's time and facilities and whether they improperly solicited clients while still in plaintiff's employ"]). Defendants do not establish, as a matter of law, that they assisted Sannella in forming BLR solely on their own time. Therefore, the court denies defendants' motion for summary judgment as to the breach of fiduciary duty cause of action.

However, defendants are entitled to summary judgment dismissing Informa's accounting cause of action. A claim for an accounting requires the "existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept 1986]; *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997]). Informa seeks an accounting of diverted "expenses and revenue from clients or customers of Informa" (NYSCEF Doc. No. 35, ¶ 63). While defendants owed Informa a fiduciary duty, and there are issues of fact as to whether defendants breached those duties, nothing in the record or the pleadings hints that Reich or Johnson personally received any of the expenses or revenue of which it seeks an accounting. Rather, it is apparent that plaintiff seeks an accounting from nonparty BLR, not the defendants. Accordingly, the seventh cause of action for an accounting is dismissed.

3. <u>Tortious Interference with Prospective Business Advantage (Fourth Cause of Action)</u>

In order to establish tortious interference with prospective business relations, a party must show that "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]). Distinct from a cause of action for tortious interference with existing contract, a party bringing a cause of action for tortious interference with prospective business relations is required to meet a "higher standard of culpable conduct" by establishing that the alleged interference "constituted a crime or an independent tort" (*Mitzvah Inc. v Power*, 106 AD3d 485, 487 [1st Dept 2013]).

Here, even if defendants met their initial burden on summary judgment through their self-serving affidavits claiming that they did not have knowledge of particular Informa customers and took no action directed at those customers (NYSCEF Doc. No. 71, pp. 17-18), Informa's opposition raises issues of fact. In particular, the Wilby affidavit that Informa submits indicates that Informa had business relations with its customers, that customers did leave Informa after defendants' departure, and that customers canceled their IGM subscriptions after BLR went online (*see* NYSCEF Doc. No. 116, ¶ 62). Additionally, Informa raises issues of fact regarding whether defendants intentionally interfered with those business relations. Informa submits a November 27, 2019 email from Kenneth Jacques to Terry Wilber regarding "Access to your Corporate Bond information" (NYSCEF Doc. No. 127). Sannella purportedly sent this email two days after defendants resigned. Sannella sent the email to Informa customers (NYSCEF Doc. No. 116, ¶ 59) announcing the launch of the "Credit Flow Research" product as "staffed with top well-known and well-followed Investment Grade and High Yield/Leveraged analysts, including Andrea Johnson [and] Chris Reich." The email also states that Informa's customers "will no longer have access to

these analysts [the defendants] or their content if [they] are a user through Informa Global Markets" (NYSCEF Doc. No. 127).

Defendants argue that Sannella's email does not demonstrate defendants' tortious interference because neither Reich nor Johnson sent it (NYSCEF Doc. No. 71, p. 18). However, Reich testified at his deposition that he was aware that "an e-mail was going to go out at some point" (NYSCEF Doc. No. 119 at 331), and there is at least an issue of fact regarding Reich's involvement with the drafting of the email. Moreover, defendants' alleged breaches of fiduciary duty are sufficient to meet the element of "unlawful means" to establish tortious interference with prospective business relations (*see Poller v BioScrip, Inc.*, 974 F Supp 2d 204, 237 [SDNY 2013] [holding that "wrongful means" includes "fraud or misrepresentation" and that a "knowing breach of fiduciary duty may also, if it satisfies the usual common law elements, amount to a fraud or misrepresentation"]). Accordingly, the motion is denied with respect to Informa's fourth cause of action for tortious interference.

4. Unjust Enrichment (Sixth Cause of Action)

A claim for unjust enrichment allows a plaintiff to recover where a defendant "has obtained a benefit which in equity and good conscience should be paid to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012] [internal quotation marks and citation omitted]). However, this cause of action is "not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*id.*). Here, defendants have established their entitlement to summary judgment because there is no evidence that either Reich or Johnson were (individually) enriched at Informa's expense (*see Abacus Federal Savings Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010] [granting summary judgment dismissing unjust enrichment claim against former bank employee based on fraudulent scheme where the plaintiff "failed to show how [the employee] was personally enriched

at the expense of the bank, or that she herself benefitted from the fraudulent scheme"]). If the evidence establishes that any party was enriched by the misappropriation of trade secrets, it was BLR, not defendants personally.

Additionally, Informa's unjust enrichment cause of action (*see* NYSCEF Doc. No. 35, ¶¶ 60-61) is duplicative of its claims for breach of confidentiality, misappropriation of trade secrets, and breach of fiduciary duty (NYSCEF Doc. No 91, p. 22). Therefore, defendants are entitled to summary judgment dismissing the sixth cause of action for unjust enrichment.

There is no "fifth claim" or "fifth cause of action" denominated in the amended complaint.

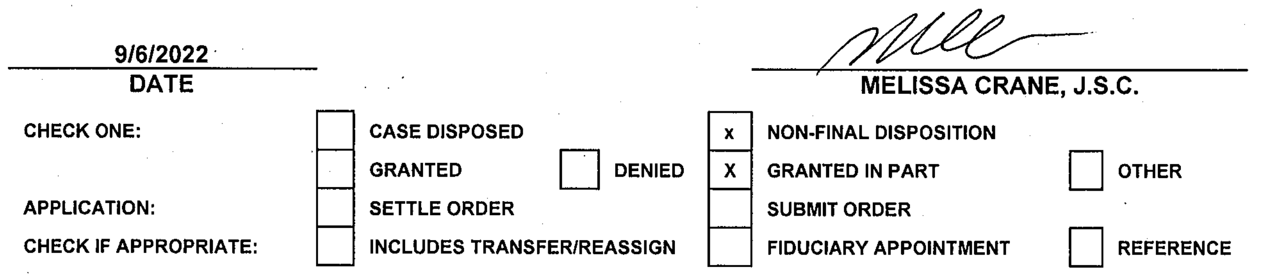
The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted in part, and Informa's first cause of action for breach of confidentiality, sixth cause of action for unjust enrichment, and seventh cause of action for an accounting are dismissed; and it is further

ORDERED that defendants' motion is otherwise denied; and it is further

ORDERED that the parties must appear for a pretrial conference on October 4, 2022 at 10:00 AM by Microsoft Teams.



9/6/2022
DATE

MELISSA CRANE, J.S.C.

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