

**KHCA Funding LLC v Versity Inv., LLC**

2024 NY Slip Op 34396(U)

December 12, 2024

Supreme Court, New York County

Docket Number: Index No. 651885/2024

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY M. BANNON PART 61M**

*Justice*

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KHCA FUNDING LLC, KNIGHTS HILL IRELAND II DAC,

Plaintiffs,

- v -

VERSITY INVEST, LLC, VERSITY INVESTMENTS, LLC, VERSITY EQUITYCO, LLC, VERSITY EQUITYCO II, LLC, VERSITY EQUITYCO PARENT, LLC, VERSITY EQUITYCO PARENT II, LLC, HAYWORTH TANGLEWOOD DST, HAYWORTH TANGLEWOOD ST, LLC, VINTAGE DST, VINTAGE ST, LLC, THE WALK DST, THE WALK ST, LLC, ONE ON 4TH DST, ONE ON 4TH ST, LLC, BRIAN NELSON, BLAKE WETTENGEL, TANYA MURO,

Defendants.

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**INDEX NO. 651885/2024**  
**MOTION DATE 08/05/2024**  
**MOTION SEQ. NO. 006**

**DECISION + ORDER ON MOTION**

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

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

**I. INTRODUCTION**

In this action arising out of a Loan Agreement, the defendants move pursuant to CPLR 3103 for a protective order limiting the bank statements sought by the plaintiffs First Set of Requests to encompass only bank statements of defendants Hayworth Tanglewood DST, Hayworth Tanglewood St, LLC, Vintage DST, Vintage St, LLC, The Walk, DST, The Walk St, LLC, One on 4th DST, and One on 4th St, LLC, (collectively, the "DST Defendants"). The defendants also move pursuant to CPLR 2304 to quash a subpoena served by plaintiffs on nonparty JPMorgan Chase Bank, N.A. ("JPMorgan"), to the extent it seeks information other than bank statements from the DST Defendants. The plaintiffs oppose the motion, and cross move pursuant to CPLR 3124 to compel the defendants to produce documents responsive to the plaintiff's First Set of Requests. The defendants oppose the cross-motion. The branch of the motion to quash is granted and is otherwise denied. The cross-motion is denied.

## II. BACKGROUND

The plaintiffs allege that they, as lenders, and defendants Versity EquityCo, LLC and Versity EquityCo II, LLC (“Equity Co” and “Equity Co II”, respectively), as borrowers, entered into a Loan Agreement on May 27, 2021, and later amended the agreement on April 12, 2022. The managers of Equity Co and Equity Co II, defendants Versity Investments LLC and Versity Invest LLC, are the sponsors under the Loan Agreement. The sponsors, along with their respective owners, individual defendants Blake Wettengel and Tanya Muro, as well as defendants Versity EquityCo Parent, LLC and Versity EquityCo Parent II, LLC (the “Parent LLCs”), serve as guarantors under the Loan Agreement. The plaintiffs allege they lent the borrowers \$50 million for the purpose of acquiring commercial real estate, subject to the plaintiffs’ approval. This real estate would be acquired through a Delaware Statutory Trust (“DST”). The DSTs would “syndicate”, or sell, their beneficial interests to investors, and the cash flows generated from this syndication would be used to repay the plaintiffs.

The plaintiffs further allege that after they declined to approve and finance a ninth proposed real estate acquisition in September 2022, the defendants ceased repaying the plaintiffs the amounts owed under the Loan Agreement, siphoned syndication proceeds from the four DST Defendants in this action and used these proceeds for impermissible purposes. The plaintiffs further allege that the defendants intentionally concealed \$54 million of syndication proceeds to fund other real estate transactions outside of the Loan Agreement and for Muro and Wettengel’s own personal use. The plaintiffs commenced this action, asserting causes of action sounding in breach of the Loan Agreement, unjust enrichment, conversion, fraud, and civil conspiracy, and sought \$56 million in damages and injunctive relief.

On April 19, 2024, the plaintiffs served the defendants with their First Set of Requests. As relevant here, the plaintiffs sought, from January 2021 to the present, unless specified otherwise:

No. 1: All bank statements for any and all bank accounts held in the name of or controlled directly or indirectly by any Defendant;

No. 2: Documents sufficient to show all transfers of funds between and among Defendants

No. 11: All Documents and Communications concerning [the DST] Defendants' bank accounts and/or the Collection Accounts;

No. 16: All Documents and Communications concerning any Defendants' acquisition,

directly or indirectly, of any real estate or interest in real estate or other physical property or properties, including but not limited to the residential properties referenced in the Complaint;

No. 24: Documents sufficient to show compensation of all employees of any Defendant from January 2022 to the present; and

No. 25: Documents sufficient to show all limited liability companies, corporations, businesses, or other interests owned in whole or in part by any Guarantor.

On May 23, 2024, the plaintiffs also gave notice to the defendants that they intended to serve a subpoena duces tecum on nonparty JPMorgan. The plaintiffs served this subpoena on June 14, 2024, seeking the follow documents:

- 1) All bank statements for any and all bank accounts held in the name of or controlled directly or indirectly by any defendant,
- 2) All bank statements for any and all bank accounts held in the name of or controlled directly or indirectly by any Guarantor, and
- 3) All bank statements for any and all bank accounts held in the name of or controlled directly or indirectly by [defendants Hayworth Tanglewood DST, Hayworth Tanglewood ST, LLC, Vintage DST, Vintage ST, LLC, The Walk, DST, The Walk ST, LLC, One On 4th DST, One On 4th ST, LLC].

The defendants served their responses and objections to the First Set of Requests on June 5, 2024. Among other objections, the defendants objected to producing bank statements from all defendants, in particular Wettengel and Muro's statements, stating that the requests were overbroad and not material and necessary. The defendants further cited concerns over disclosing financially sensitive information.

The parties represent that counsel had a meet and confer on June 10, and June 13, 2024 regarding these discovery disputes. The defendants offered to produce certain bank accounts of the DST defendants in redacted form to shield the identity of investors in the DSTs. These accounts include the IU and SU accounts. The plaintiffs rejected the defendants offer to produce only the DST Defendants' IU and SU accounts in redacted form. In their reply memorandum of law filed in this motion, the defendants also stated they were willing to produce the DST Defendants' clearing account. The papers submitted do not indicate whether the defendants actually produced the DST Defendants IU, SU, and Clearing Accounts as offered. Two conferences were held by the court - on August 15, 2024, and November 14, 2024, and no resolution was reached on these discovery disputes.

### III. DISCUSSION

#### A. The Plaintiffs' Cross-Motion

Disclosure in New York civil actions is guided by the principle of “full disclosure of all matter material and necessary in the prosecution or defense of an action.” CPLR 3101(a). The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” See Kapon v Koch, 23 NY3d 32, 38 (2014). “A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is ‘material and necessary’—i.e., relevant”. Forman v Henkin, 30 NY3d 656, 661 (2018). However, the need for discovery must be weighed against any special burden to be borne by the party opposing discovery. Id. at 662. Demands for disclosure must be “relevant, describe documents with ‘reasonable particularity,’ not impose an undue burden and not represent a ‘fishing expedition.’” Konrad v 136 E 64th St. Corp., 209 AD2d 228, 228 (1<sup>st</sup> Dept. 1994) (citations omitted); CPLR 3120.

In their cross-motion, the plaintiffs seek to compel the defendants to produce documents responsive to requests numbers 1, 2, 11, 16, 24, and 25 from the plaintiffs’ First Set of Requests, for a period commencing on January 1, 2021. These demands are improperly overbroad for several reasons. First, the start date of January 1, 2021, is overreach, as the complaint alleges that the defendants began falsely reporting syndication levels “within a matter of weeks” of September 2022 and began siphoning syndication proceeds, after the plaintiffs denied approval of a ninth proposed real estate acquisition. The plaintiffs are not entitled to a fishing expedition of all of the defendants’ records stretching back to a year and a half before the defendants allegedly breached the Loan Agreement and committed the torts alleged.

Furthermore, many of these demands seek “any and all” documents from “any defendants”. Courts view document requests for “any and all” documents as indicative of a lack of the requisite specificity. See Mendelowitz v Xerox Corp., 169 AD2d 300, 303-04 (1<sup>st</sup> Dept. 1991); Grotallio v Soft Drink Leasing Corp., supra. Such demands may still be proper in certain limited circumstances, provided the demands relate to a specific subject matter and thus does not impede a ready identification of the particular things to be produced. Mendelowitz v Xerox Corp., supra at 304; see also In re Citibank, N.A., 100 AD2d 784 (1<sup>st</sup> Dept. 1984). However, here, demands for “all documents and communications” concerning the DST Defendants bank

accounts (No. 11), or “all documents and communications concerning any defendants’ acquisition...of any real estate or interest in real estate” (No. 16), lack the requisite specificity.

The demands seeking the production of bank statements, including No. 1 (“all bank statements for any defendant directly or indirectly controlled by any defendant”, and No. 2 (“all transfers of funds between and among defendants”), is overbroad as it seeks personal banking information from individual defendants Muro and Wettengel, and as stated earlier, the dates for which these records are sought extend for a year and a half before the defendants are alleged to have breached the Loan Agreement and began to siphon syndication funds. See Aetna Ins. Co. v Mirisola, 167 AD2d 270 (1<sup>st</sup> Dept. 1990) (discovery requests denied as overbroad and seeking information of a confidential and private nature not relevant to issues). While section 8.1(f) of the Loan Agreement states that the “borrowers”, are to provide the plaintiffs with “read only access” to “bank accounts” “from time to time”, this provision applies only to defendants EquityCo and EquityCo II, the Parent LLCs, and the DSTs. Furthermore, because these requests “fail to specify with reasonable precision” which bank records are sought, neither the court nor the defendants are obligated sift through the demand “to cull the good from the bad”. Grotallio v Soft Drink Leasing Corp., 97 AD2d at 383 (1<sup>st</sup> Dept. 1983). Thus, “when discovery demands are palpably improper in that they are overbroad, lack specificity or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than prune it.” Matter of Cheryl LaBella Hoppenstein 2005 Trust, 186 AD3d 1230, 1233 (2<sup>nd</sup> Dept. 2020) (internal citation omitted). Finally, request No. 24, which seeks documents “to show compensation of all employees of any defendant” is overbroad for the same reasons as stated earlier and is irrelevant to the plaintiffs’ claims. The complaint does not make any allegation that the defendants siphoned syndication funds by paying their employees or any other such basis.

#### B. The Defendants’ Motion

The Court of Appeals in Kapon v Koch, 23 NY3d 32 (2014), held that a subpoenaing party has the initial burden of demonstrating a need for the disclosure, and must sufficiently state the “circumstances or reasons” that support disclosure. Kapon, supra at 32. Such notice is required to provide a third-party with enough information to apprise a stranger to the litigation the ‘circumstances or reasons’ why the requested disclosure was sought or required.” Id. at 39. The discovery sought must be “material and necessary.” Id. at 36; see CPLR 3101(a). Where the requests are palpably overbroad, neither the subpoenaed party nor the court is required to prune the requests to “cull the good from the bad.” Grotallio v Soft Drink Leasing Corp., supra at

383; see Soho Generation of New York, Inc. v Tri-City Ins. Brokers, Inc., 236 AD2d 276 (1<sup>st</sup> Dept. 1997); see also Matter of Cheryl LaBella Hoppenstein 2005 Trust, supra. A subpoena that demands “any” and “all” documents are overbroad since it may encompass some materials that are be privileged or “clearly irrelevant.” Grotallio v Soft Drink Leasing Corp., supra at 383.

It is also well settled that “[a] subpoena may not be used as a tool of harassment or for a proverbial “fishing expedition to ascertain the existence of evidence.” Reuters Ltd. v Dow Jones Telerate, Inc., 231 AD2d 337, 342 (1<sup>st</sup> Dept. 1997); see Law Firm of Ravi Batra, P.C. v Rabinowich, 77 AD3d 532 (1<sup>st</sup> Dept. 2010). Moreover, “[w]here disclosure is sought against a nonparty, more stringent requirements are imposed on the party seeking disclosure.” Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104, 108 (1<sup>st</sup> Dept. 2006); see generally Kapon v Koch, supra.

These standards require that the instant motion be granted. The subpoena served by plaintiffs on JPMorgan is overbroad for similar reasons as stated herein, as they seek “all bank statements for any and all bank accounts” of the defendants, without “specifying with reasonable precision the records sought.” Grotallio v Soft Drink Leasing Corp., supra at 383. Thus, the subpoena served on non-party JPMorgan is quashed to the extent it seeks information other than IU, SU, and Clearing Account bank statements from the DST Defendants.

Finally, the courts notes that the defendants have offered to produce the DST Defendants’ IU, SU, and Clearing Account bank statements with investor information redacted. To the extent that they have not already done so, the defendants are to produce these documents within 30 days of this order.

To the extent that the defendants also seek a protective order pursuant to CPLR 3103, that branch of the motion is denied, without prejudice. As the plaintiffs’ subpoena is quashed, and the plaintiffs’ cross motion is denied, a protective order is unnecessary at this juncture. A protective order is to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103), which is not demonstrated here.

The court has considered the plaintiffs' remaining arguments and finds them without merit. Any relief not expressly granted herein is denied.

IV. CONCLUSION

Accordingly, upon the foregoing papers, it is,

ORDERED that the defendants' motion is granted and the subpoena served on non-party JPMorgan Chase Bank, N.A. is quashed to the extent it seeks information other than IU, SU, and Clearing Account bank statements from the DST Defendants, and the non-party need not respond to that portion of the subpoena, and the motion is otherwise denied, and it is further,

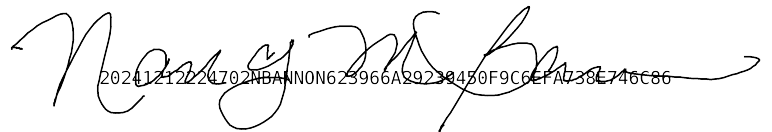
ORDERED that the plaintiffs' cross-motion is denied, and it is further,

ORDERED that the defendants shall produce the IU, SU, and Clearing Account bank statements of the DST Defendants within 30 days of this order, to the extent that the defendants have not already produced such documents, and it is further,

ORDERED that the parties shall appear for a status conference on January 9, 2025, at 10:00 am, as previously scheduled, and it is further,

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the Court.



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<u>12/12/2024</u> DATE					<u>NANCY M. BANNON, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	OTHER
			<input type="checkbox"/>	REFERENCE	