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

In the Matter of the Application of TUSK STRATEGIES, INC., AND CHRIS COFFEY Petitioners, For an Order Pursuant to CPLR 3119(e) and CPLR 2304 Quashing Subpoenas Ad Testificandum and Duces Tecum and for a Protective Order Pursuant to CPLR 3103 Served by: CUSTODIAN ROBERT B. PINCUS, ESQ. Respondent, In the action entitled *In re: TRANSPERFECT GLOBAL*, Case Nos. 9700-CB, 10449-CB in the Court of Chancery of the State of Delaware.	Index No.

MEMORANDUM IN SUPPORT OF PETITION TO QUASH NONPARTY SUBPOENAS AND FOR A PROTECTIVE ORDER

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Pursuant to New York Civil Practice Laws and Rules ("CPLR") 3119(e), 2304 and 3103, nonparties Tusk Strategies and Chris Coffey ("Petitioners") petition to quash the subpoena duces tecum and ad testificandum (the "Subpoenas," Exs. 1-2) issued by Custodian Robert Pincus, on August 2, 2017. In the alternative, Petitioners seek a protective order limiting the scope of the document requests on Petitioners and precluding the deposition of Petitioner Chris Coffey.

INTRODUCTION

The Subpoenas that Petitioners challenge are designed to chill civic discourse on a matter of public importance. They were not issued *by* or *to* a party to the underlying business disputes that have been litigated for years in Delaware. Nor do they purport to seek information related to the "prosecution or defense of an action," as they must under CPLR § 3101(a). And they were approved by a court in Delaware without any opportunity for the Petitioners to be heard regarding the Subpoenas' enforceability. Petitioners now seek this Court's assistance to quash, vacate, or substantially limit these burdensome discovery requests.

Petitioner Chris Coffey is a public affairs professional based in New York, who works for Petitioner Tusk Strategies, a New York-based strategy and communications firm. Tusk and Coffey for the past year have been working on behalf of Citizens for a Pro-Business Delaware ("Citizens"), a group that was formed to advocate for the employees of the Delaware-based translation services company TransPerfect Global ("TransPerfect") and concerned Delaware citizens, after the Delaware Court of Chancery ordered the sale of TransPerfect in response to litigation arising out of business disputes between TransPerfect's founders. This court-ordered sale is unprecedented. It is the first time a Delaware court has forced the sale of an ongoing and profitable Delaware company without stockholders' consent. The forced sale has potentially significant implications for the future of TransPerfect's employees' jobs. More broadly, the

sale—which could deter companies from incorporating in Delaware—may have adverse economic effects in the state, which derives hundreds of millions of dollars annually in revenue annually from the incorporation business.[1] Public debate and discourse around this unprecedented forced sale and its implications have understandably been vigorous within Delaware, including in the state legislature, which is considering a potential statutory response. Through their work for Citizens, Tusk and Coffey have helped give voice to TransPerfect employees and citizens in that discussion.

To carry out the forced sale, the Court of Chancery appointed Robert Pincus of the law firm Skadden, Arps, Slate, Meagher & Flom LLP, as the company's custodian ("Custodian"), and authorized him to take steps to sell the company. The Custodian has been doing so and the sale process has been progressing.

Throughout the sale process, Citizens has tried to draw attention to its members' concerns about the sale process and its implications. To that end, in late-July 2017, Citizens ran (1) a press release referencing concerns that one potential bidder might move their jobs offshore, and (2) another press release and advertisement that listed the fees charged by the Custodian and the many advisors he has hired to assist him in selling the company, collectively totaling more than $20 million over an 18-month period. In response to these two press releases and advertisement by Citizens, the Custodian claims he needs to identify any TransPerfect employees who allegedly disclosed this information—notwithstanding that much of this information was already public. And to do so, he has claimed he needs to serve the Subpoenas on the foreign nonparty Petitioners. Although the asserted basis for the Subpoenas is the Custodian's concern about the

[1] *See, e.g.*, Jonathan Starkey, *Delaware Taxes: Top 5 Sources of State Revenue*, Delaware Online (May 19, 2014), *available at* http://www.delawareonline.com/story/firststatepolitics/2014/05/19/delaware-taxes/9279693/.

sources of information for the press releases and advertisement, the Subpoenas seek a far broader range of information, including: communications between Coffey or Tusk and Citizens (which is also a nonparty); all communications between Coffey or Tusk and any current or former TransPerfect employee, director, or shareholder; all documents regarding payments made to Coffey or Tusk on behalf of Citizens; and all documents regarding the funding sources for Citizens.

The Custodians' Subpoenas do not survive the relevant standard under New York law. New York law requires subpoenas to seek information that is "material and necessary in the prosecution or defense of an action," CPLR § 3101(a), which typically means it must be relevant to proving an allegation or preparing an issue for trial. The Subpoenas are ostensibly in service of facilitating the company's sale, not the "prosecution or defense of" any of the four consolidated lawsuits in the Delaware Court of Chancery that have arisen out of the business disputes between the TransPerfect founders and which have been substantially resolved at this point (collectively, the "Delaware Actions"). Moreover, the Custodian is not a party to—and has never played a role in litigating the merits of—any of the Delaware Actions. And he has not even attempted to assert that the information he seeks through the Subpoenas is "material or necessary to the prosecution or defense of an action" in these litigations. That threshold fact alone requires the Subpoenas to be quashed.

The Custodian claims the Subpoenas are necessary because the allegedly improperly disclosed information described above somehow threatens to harm the sale process and that the Subpoenas are needed to identify the sources of those alleged disclosures. As explained by the Custodian, the Subpoenas are predicated solely on the provision of the Delaware court's order governing the sale process that requires the TransPerfect employees to "cooperate fully" with the

Custodian in carrying out his duties, specifically, selling the company. The Custodian essentially contends that he should be empowered to identify and root out anyone who, in his own opinion, has violated the cooperation requirement. This contention, however, relies completely on the unsupported and untested conclusion that any disclosures *actually* harmed the sale process. We are unaware of any evidence supporting this conclusion and, if anything, the sale process appears to be moving forward without impediment.

In the alternative, this Court should grant a protective order vacating the Subpoenas or, at a minimum, substantially limiting their scope and precluding the deposition of Petitioner Coffey. The Subpoenas are vastly overbroad and duplicative, and they are nothing more than an attempt to cause "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" to Tusk and Coffey—and, by association, Citizens—as a consequence for the assistance they provided to TransPerfect employees and Delaware citizens in voicing their concerns regarding the Delaware court's unprecedented actions. CPLR § 3103(a). A protective order vacating or, at a minimum, substantially limiting the Subpoenas is therefore necessary to prevent this abuse of discovery.

PETITIONERS AND PARTIES TO THE DELAWARE ACTION

Petitioner Chris Coffey is a New York, New York-based public affairs professional who works for Petitioner Tusk Strategies, a New York, New York-based strategic communications firm. Tusk and Coffey for the past year have been working on behalf of Citizens. Neither of the Petitioners is a party to the underlying Delaware Actions; nor is Citizens a party.[2]

[2] In May 2017, Citizens moved to intervene for the limited purpose of requesting public disclosure of certain of the Custodian's confidential filings and the Custodian's and advisors' fees and expenses. In response, the Custodian sought extensive discovery from Citizens. To avoid the "expense, drain of time, and harassment of its members and donors that would result from the threatened discovery," Citizens withdrew its motion. *See* Ex. 21 (June 7, 2017 Brief of Citizens for a Pro-Business Delaware, Inc. in Opposition to the Custodian's Request for Discovery) at 3.

The parties to the Delaware Actions are Liz Elting, Philip Shawe, and Shirley Shawe, the TransPerfect founders and directors (Elting and Philip Shawe) and stockholders (Elting, and Philip and Shirley Shawe) who resorted to litigation to resolve various business disputes.

The Delaware Court of Chancery appointed Pincus to serve as the Custodian and authorized him to take steps to sell TransPerfect. Pincus is a partner in the law firm of Skadden, Arps, Slate, Meagher and Flom LLP, which also represents Pincus in this and other matters.

BACKGROUND

I. The Delaware Actions and The Sale Process Order

Liz Elting and Philip Shawe founded TransPerfect, a global legal translation company, in the early 1990s and they continue to serve as the company's directors, with Elting owning 50 percent, Shawe owning 49 percent, and Shawe's mother, Shirley Shawe, owning one percent. When the relationship between Elting and Shawe (who were once romantically involved) soured, they resorted to an unrelenting campaign of litigation, which has endured for more than three years. In addition to several suits they have filed against each other in New York Supreme Court that have been dismissed or resolved,[3] in the Delaware Court of Chancery, Shawe filed an action against Elting for waste, breach of fiduciary duty, unjust enrichment, breach of contract and indemnification; Elting filed three petitions: one seeking the dissolution of a relatively small limited liability company associated with TransPerfect; one seeking the appointment of a custodian to act in the best interests of TransPerfect; and another seeking the appointment of a custodian to sell TransPerfect and the dissolution of the company. Chancellor Andre Bouchard consolidated these Delaware Actions, and after holding a trial in 2015 he denied Shawe's claims against Elting, ordered the dissolution of the limited liability company, and appointed the

[3] *See, e.g.*, *Shawe v. Elting*, No. 153375/2016, 2017 WL 2882221 (NY Sup. Ct. June 29, 2017); *Shawe v. Elting*, No. 155890/2014, 2017 WL 3086814 (NY Sup. Ct July 20, 2017); *Elting v. Shawe*, No. 651423/2014, 2014 WL 7503653 (NY Sup. Ct. Dec. 22, 2014). The Subpoenas do not arise from any of these New York actions.

Custodian to sell TransPerfect and, in the interim, to serve as a third director of the company. *In re Shawe & Elting LLC*, Nos. 9661, 9686, 9700, 10449, 2015 WL 4874733 (Del. Ch. Aug. 13, 2015).

In June 2016, Chancellor Bouchard accepted the Custodian's proposed plan for a modified auction of TransPerfect, Ex. 3 (June 21, 2016 letter from Chancellor Bouchard to counsel), and the next month entered an order granting him authority to carry out the sale process ("Sale Process Order"). Ex. 4 (July 18, 2016 Order for Custodian to Undertake a Sale Process). The Sale Process Order tasks the Custodian with exploring, negotiating, and executing a sale of the company, and in order to do so, it grants him authority to, among other things, obtain company information, establish a data room, oversee the creation of marketing materials, implement management and employee incentive retention plans, retain advisors, determine the bidding process, evaluate offers, select the winning bidder, and execute all agreements necessary to effect the sale. *Id.* at ¶¶ 1, 2, 3, 5, 8, 9, 11. Among other provisions, and of greatest relevance here, the Sale Process Order provides that: "The Custodian's actions pursuant to the Order are binding upon the directors, stockholders, officers, employees, consultants and agents of the Company, all of whom shall *cooperate fully* with the Custodian in the performance of his duties under the Order." *Id.* at ¶ 12 (emphasis added). For his work, the Sale Process Order provides that the Custodian "shall be compensated at the usual hourly rate he charges as a partner of the Firm [Skadden Arps]," and he must "petition the Court on a monthly basis … for approval of fees and expenses." *Id.* at ¶ 14. And it provides that the Custodian's actions may be "subject to review and reversal by the Court" only if a party shows that the Custodian abused his discretion. *Id.* at ¶ 15.

The Shawes appealed Chancellor Bouchard's appointment of the Custodian to sell TransPerfect and the Sale Process Order. In a 4-1 decision, the Delaware Supreme Court affirmed the Court of Chancery's decision to appoint the Custodian to sell the company and the Sale Process Order.[4] *Shawe v. Elting*, 157 A.3d 152 (Del. Sup. Ct. 2017).

II. Citizens for a Pro-Business Delaware and Its Press Releases and Ads

The court-ordered sale of a profitable Delaware company without stockholders' consent is unprecedented. The forced sale of TransPerfect raises serious concerns for its employees about the future of their jobs. It also raises serious concerns for Delaware citizens insofar as it might establish a precedent that would deter companies from incorporating in Delaware, and therefore deprive Delaware of crucial revenue from the state's incorporation industry. After the court ordered the sale, Citizens formed as a membership organization for those concerned about the implications of the forced sale. Citizens has, among other things, supported a bill in in the Delaware legislature—which has recently been voted out of committee and will be reviewed by the full Delaware Senate—that would require a three-year cooling off period if courts force the sale of a company incorporated in Delaware. Citizens has more than 2,200 members, including current and former TransPerfect employees, as well as concerned Delaware citizens.

On July 21, 2017, TransPerfect employees and Citizens members attended one of Chancellor Bouchard's speaking engagements to protest his order to sell TransPerfect. On July 25, Citizens issued a press release about the event that stated that "[o]ver the last two weeks, employees have heard that Lionsbridge is a potential buyer," and that TransPerfect employees and members of Citizens "asked Judge Bouchard to eliminate Lionsbridge [one of TransPerfect's largest competitors] from being involved in the sales process," because of concerns that it would

[4] Justice Valihura dissented on the ground that a court-appointed custodian cannot force a stockholder to sell his or her stock without consent.

outsource many employees' jobs overseas. *See* Ex. 5 (July 25, 2017 Press Release). Lionbridge is one of TransPerfect's largest competitors in the translation services industry.

On July 27, 2017, Citizens issued a press release and advertisement expressing concern that Pincus was charging TransPerfect $1,425 per hour for his work as Custodian, and identifying the advisors he has hired to assist him in selling the company as well as their fees and his own fees to date, which totaled more than $20 million over an 18-month period. *See* Ex. 6 (July 27, 2017 Press Release); Ex. 7 (July 27, 2017 DelawareforBusiness.org, *Advertisement*).

Although the Subpoenas aim to identify the sources behind the press releases and advertisement, much of the information described therein was already public. For instance, a February 2017 news article in Barcelona—where hundreds of TransPerfect employees work—stated that "[b]anking sources close to the deal" said Lionbridge would be a potential bidder for TransPerfect. Ex. 8 (Carles Ballfugo, *Transperfect proyecta alcanzar los 1.000 puestos de trabajo en Barcelona en 2020*, Cronica Global (February 8, 2017)) (translated). And numerous sources mentioned Lionbridge as a likely bidder.[5] More recently, Mergermarket reported that according to two sources TransPerfect asked bidders to submit second-round offers and HIG Capital (the private equity group that owns Lionbridge), a company named Platinum Equity, and Philip Shawe were potential bidders. Ex. 9 (Bhavna Kaul & Marlene Givant Star, *TransPerfect Takes Refresh Bids, Sources Say*, Mergermarket (August 15, 2017)). As for the Custodian's

[5] *See, e.g.*, Ex. 22 (Kimon Fountoukidis, *Lionbridge: The Spin Doctors*, LinkedIn Pulse (Dec. 21, 2016) ("These guys [Lionbridge] know what they are doing and I wouldn't be surprised if buying Translations.com/Transperfect (the second biggest company in our industry) is part of that plan."); Ex. 23 (Luigi Muzii, *My Take on the Talk of the Moment, the LIOX Deal,* sQuid (Dec. 18, 2016) (noting that the Lionbridge CEO stated that Lionbridge intended to participate actively in mergers and acquisitions, and stating that "[t]he best candidate in this respect is TransPerfect"); Ex. 24 (*TransPerfect Rival Lionbridge Gets Buyout Offer*, Delaware Business Now (Dec. 13, 2016) (discussing H.I.G. Capital's recent purchase of Lionbridge and implying H.I.G. may also be looking to buy TransPerfect by "H.I.G. is no stranger to Delaware"); Ex. 25 (Charles Taylor, *Lionbridge and SDL Trying to Capitalize on TransPerfect Shareholder Dispute*, Seeking Alpha (June 30, 2016) ("[I]f Elting refuses the offer and forces the sale, this could provide a big opportunity for either Lionbridge or SDL to purchase TransPerfect and become the undisputed leader of the translation industry.").

fees, in a March 2017 publicly-filed response to an Associated Press reporter's request, the Custodian himself listed $3.5 million in fees broken down by month; in subsequent months his monthly fees were disclosed in publicly-filed orders approving his fees and expenses. *See* Ex. 10 (March 15, 2017 Custodian's filing in response to AP reporter's request) at 5; *see also e.g.*, Ex. 11 (April 1, 2017 Order listing $294,007.32 in fees and expenses); Ex. 12 (May 2, 2017 Order listing $221,874.40 in fees and expenses); Ex. 13 (May 31, 2017 Order listing $445,767.12 in fees and expenses); Ex. 14 (June 28, 2017 Order listing $376,866.82 in fees and expenses); Ex. 15 (Aug. 2, 2017 Order listing $295,469.09 in fees and expenses).[6] In addition, the identity of several of the Custodian's advisors had also previously been disclosed in publicly-filed court documents dating back to 2015 and 2016. *See, e.g.*, Ex. 3 (June 21, 2016 letter from Chancellor Bouchard to counsel) approving the Custodian's proposed plan of sale, identifying Houlihan Lokey Capital, Inc., Alvarez & Marsal, and Grant Thornton as advisors); *see also* Ex. 16 (Philip Shawe's Brief in Support of His Motion to Disqualify Ronald S. Greenberg as Trial Counsel (February 12, 2015)) (identifying Thomas Pennell as a "long-time consultant for TransPerfect"); Ex. 17 (February 19, 2015 Pretrial Conference Transcript)) (identifying Pennell as "an advisor to the company").

III. The Custodian's Request for the Subpoenas

In a July 31, 2017 letter to the Delaware Court of Chancery, the Custodian's attorney informed the Court that the Custodian believed that one or more TransPerfect employees had "leaked" the information contained in the Citizens press releases and advertisement. *See* Ex. 18 (July 31, 2017 letter from Jennifer C. Voss to Chancellor Bouchard) at 2. To support this claim,

[6] News articles had previously reported on Pincus's hourly rates. *See, e.g.*, Ex. 26 (Amy Kolz, *Bankruptcy Rates Top $1K Mark in 2008-09*, The AmLaw Daily (Dec. 15, 2009)) (noting that Pincus's rate as of 2008-09 was $1,050 per hour).

the Custodian asserted, among other things, that the July 27 "advertisement itself states that the information was provided by a 'TransPerfect employee.'" *Id.* at 5. This assertion was untrue. In fact, there was no reference in the advertisement to information being provided by a "TransPerfect employee" or anyone else. Nor did the Custodian's request for subpoena authority describe the numerous public sources that already have reported on Lionbridge as a potential bidder, and have already disclosed the Custodian's own fees and the identity of several of his advisors.

The letter also sought permission to obtain discovery from the "recipients of the leaked information"—*i.e.*, Tusk and Coffey—in order to identify the employees who allegedly improperly disclosed information. *Id.* at 2. The letter alleged that the disclosed information was used to "try to harm the sales process, and intimidate potential acquirers and the advisors," and it invoked paragraph 12 of the Sale Order, which provides that TransPerfect employees "'shall cooperate fully with the Custodian in the performance of his duties under the Order' including the sale of the Company." *Id.* at 3. The letter also suggested that such disclosures violated confidentiality provisions in the TransPerfect Employee Handbook. The letter attached two sample subpoenas, requesting a deposition and documents from Coffey and documents from Tusk. *See* Ex. 19 (Sample Subpoenas). Neither Coffey nor Tusk was given notice of this letter or the Custodian's request for authority to issue the Subpoenas.

On August 1, 2017, the Court held a brief teleconference to address the Custodian's discovery request. Neither Coffey nor Tusk was given notice or provided with an opportunity to participate. The Custodian and his counsel, as well as counsel for Elting, Phil Shawe, and Shirley Shawe, attended. Counsel for Elting joined the Custodian's discovery request, and counsel for Phil and Shirley Shawe took no position on it. *See* Ex. 20 (August 1, 2017

Teleconference Transcript). After the Custodian made clear that the purpose of the discovery was to "obtain information regarding who within the company has disclosed this information, and then take appropriate action thereafter," *id.* at 4:24-5:2, the Court granted the Custodian's discovery request, without any discussion of the particular requests contained in the sample subpoenas.

IV. The Subpoenas

The Subpoenas Pincus served on Coffey and Tusk pursuant to CPLR § 3119 are essentially identical to one another. *See* Exs. 1-2 (Subpoenas). They request the following nine categories of documents:

1. Documents and communications exchanged between Tusk/Coffey and Citizens regarding any consultants or advisors hired by Pincus or TransPerfect.

2. Documents and communications exchanged between Tusk/Coffey and any current or former TransPerfect employee, director, or shareholder, or any agent of such person, regarding any consultants or advisors hired by the Custodian or TransPerfect.

3. Documents and communications exchanged between Tusk/Coffey and Citizens regarding any potential acquirer of TransPerfect.

4. Documents and communications exchanged between Tusk/Coffey and any former or current TransPerfect employee, director, or shareholder, or any agent of such person, regarding any potential acquirer of TransPerfect.

5. Tusk's/Coffey's sources for the information in the July 25, 2017 press release.

6. Tusk's/Coffey's sources for the information in the July 27, 2017 ad and press release.

7. Documents and communications between Tusk/Coffey and any former or current TransPerfect employee, director, or shareholder, or any agent of such person.

8. Documents evidencing payments to Tusk/Coffey by or on behalf of CPBD or any former or current TransPerfect employee, director, or shareholder, or any agent of such person.

9. Documents regarding funding sources for CPBD.

The Subpoenas also direct Coffey to appear for a deposition at the New York City office of Skadden, Arps, Slate, Meagher & Flom LLP, on August 30, 2017.

ARGUMENT

I. The Court Should Quash the Subpoenas

A. Legal Standard

Under New York law,[7] subpoena requests may seek information that is "material and necessary in the prosecution or defense of an action." CPLR § 3101(a); *see also Kapon v. Koch*, 23 N.Y.3d 32, 36, 11 N.E.3d 709, 713, 988 N.Y.S.2d 559, 563 (2014). The goal of this discovery standard is to allow disclosure of whatever facts will help "ensur[e] that cases be decided on their merits after a full vetting of the facts." *Akst v. Cooper Tire Co.*, 33 A.D.3d 24, 29, 816 N.Y.S.2d 45, 51 (1st Dep't 2006) (quotation marks omitted).

"It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on *the claims*." *State Farm Mut. Auto. Ins Co. v. RLC Med., P.C.*, 150 A.D.3d 1034, 1035, 55 N.Y.S.3d 313, 315 (2d Dep't 2017) (internal quotation marks and citation omitted; emphasis added). Courts have typically held that in order for facts to be discoverable they must be "relevance to proving the allegations in the complaint," *DeLeonardis v. Hara*, 136 A.D.3d 558, 558, 25 N.Y.S.3d 185, 185-86 (1st Dep't 2016) (citing, *inter alia*, *Andon*), or they must "'bear[] on the controversy which will assist preparation for trial by sharpening the issues,'" *Andon v. 302-304 Mott St. Assoc.*, 94 N.Y.2d 740, 746-47, 731

[7] CPLR § 3119 provides that an application to quash an out-of-state subpoena "must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted." CPLR § 3119(e).

N.E.2d 589, 592-93, 709 N.Y.S.2d 873, 876-77 (quoting *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968)).[8]

Subpoenas may not seek "unlimited, uncontrolled, [or] unfettered disclosure." *State Farm*, 150 A.D.3d at 1035, 55 N.Y.S.3d at 315 (internal quotation marks and citation omitted); *Caban v. Plaza Const. Corp.*, No. 15557/2007, 2013 WL 5451847, at *2 (N.Y. Sup. Ct. Sept. 26, 2013) ("unlimited disclosure[] is not required"). Where a subpoena seeks information that is "utterly irrelevant" to the action or "the futility of the process to uncover anything legitimate is inevitable or obvious," the subpoena should be quashed. *Kapon*, 23 N.Y.3d at 34, 11 N.E.3d at 711, 988 N.Y.S.2d at 562 (internal quotation marks omitted). New York courts routinely deny requests seeking irrelevant information in a variety of contexts.[9]

B. The Subpoenas Seek Information that is Utterly Irrelevant to any "Action" or "Claim"

Because of the *sui generis* nature of the Subpoenas, this petition arises in a unique context. The subpoenaing party—the Custodian—is neither a plaintiff nor defendant in any of the four underlying Delaware Actions, and all of those Actions have been substantially resolved.

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[8] *Cf. BGC Partners Inc. v. Bd. Of Trade of City of Chicago*, No. 600437/09, 2011 WL 5007612, at *5 (N.Y. Sup. Ct. Sept. 27, 2011) ("This court is well aware and fully supports liberal discovery. However, liberal discovery is used to obtain material and necessary facts that may be used to sharpen issues for trial.") (denying motion to compel under CPLR 3101).

[9] Although we are not aware of any cases litigating the permissibility of subpoena requests in circumstances directly comparable to those that gave rise to the Subpoenas, decisions quashing subpoenas in a wide range of cases confirm that it is not uncommon for New York courts to grant motions to quash. *See, e.g., Hackshaw v. Mercy Med. Ctr.*, 139 A.D.3d 798, 800, 33 N.Y.S.3d 297, 300 (2d Dep't 2016) (denying request for training materials for years subsequent to medical malpractice claims); *Haron v. Azoulay*, 132 A.D.3d 475, 475, 19 N.Y.S.3d 12, 13 (1st Dep't 2015) (affirming quashing of discovery where nonparty "established that defendant had already received all relevant documentation regarding plaintiff's compensation and salary" and concluding that "the subpoena is tantamount to a fishing expedition based on defendant's baseless speculation of plaintiff's true worth to his employer"); *Smile Train, Inc. v. Ferris Consulting Corp.*, 117 A.D.3d 629, 631, 986 N.Y.S.2d 473, 475 (1st Dep't 2014) (denying discovery related to dismissed claims); *In re Ferro, Kuba, Bloom, Mangano, Gacovino & Lake, P.C.*, 8 A.D.3d 563, 564, 778 N.Y.S.2d 723, 724 (2d Dep't 2004) (holding that subpoena should have been quashed because, among other reasons, "[d]isclosure is not warranted based only on speculation that some unspecified information will be found with which to impeach the complaining witness in the underlying criminal prosecution"); *State Farm Mut. Auto. Ins. Co. v. RLC Med., P.C.*, 150 A.D.3d 1034, 55 N.Y.S.3d 313 (2d Dep't 2017) (internal quotation marks and citations omitted) (reversing trial court's decision to direct estate administrator to appear for a deposition).

Nor is the identity of any employees who made allegedly improper disclosures—*i.e.*, the core information the Subpoenas seek—is entirely irrelevant to the merits of any of the Delaware Actions. Thus, there is no colorable basis to argue that the Subpoenas seek information that is "material and necessary in the prosecution or defense of an action." The Subpoenas therefore should be quashed.

The Custodian's efforts to stretch the appropriate grounds for issuing a subpoena—and imposing burdensome discovery duties on foreign nonparty Petitioners—in this unusual context also should be rejected. First, the Custodian claims the information requested in the Subpoenas is necessary to facilitate his sale of the company. This claim relies on his theory that the purported employee disclosures harmed the sale process and thereby violated the Sale Process Order's cooperation requirement. But that theory should be rejected because it relies on the premise that any disclosures have *actually* harmed the sale process; yet, there is no evidence of any such harm. Second, the Custodian has also suggested that identifying the employees who allegedly improperly disclosed information would help him promote compliance with TransPerfect Employee Handbook confidentiality provisions. But compliance with a company's internal rules and procedures is not an appropriate basis for imposing costly discovery burdens on foreign nonparty Petitioners. The Subpoenas should therefore be quashed.

1. The Subpoenas do not seek information that is material and necessary to the underlying action

The Subpoenas do not seek information that is "material and necessary in the prosecution or defense of an action." CPLR § 3101(a)(4). Here, the underlying "actions" are four litigations in Delaware between Elting and the Shawes: one for waste, breach of fiduciary duty, unjust enrichment, breach of contract and indemnification; and three petitions seeking the dissolution of a limited liability company associated with TransPerfect, the appointment of a custodian to act in

the best interests of TransPerfect, and the appointment of a custodian to sell TransPerfect. Discovery into the identity of any employees who may have made allegedly improper disclosures—*i.e.*, the core information the Subpoenas seek—is not necessary to promote resolution of the merits of any of these actions. *Akst*, 33 A.D.3d at 29, 816 N.Y.S.2d at 51. Any such information would be irrelevant to proving the allegations in these actions or sharpening any issues for trial or resolution. *See Andon*, 94 N.Y.2d at 746-47, 731 N.E.2d at 592-93, 709 N.Y.S.2d at 876-77; *DeLeonardis*, 25 N.Y.S.3d 185 at 185-86.

In any event, even if the information sought here did somehow bear on the merits of the Delaware Actions, those litigations were resolved well before the Custodian sought the Subpoenas. The first action was dismissed, and the remaining three petitions were substantially granted. In addition, the Delaware Supreme Court put to rest any dispute about the appointment of the Custodian to sell TransPerfect. Because the Subpoenas seek information that is "'utterly irrelevant' to the [Delaware] [A]ction[s]," they should be quashed. *Kapon*, 23 N.Y.3d at 34, 11 N.E.3d at 711, 988 N.Y.S.2d at 562.

2. The requested information is not material and necessary to the Sale Process Order's cooperation requirement

Instead of arguing that the Subpoenas are relevant to the underlying Actions, which he cannot claim, the Custodian argues that the Subpoenas are relevant to his effort to sell the company, and in particular to his effort to enforce the cooperation requirement in the Sale Process Order. Even if this Court entertains the notion that the Subpoenas need not be "material and necessary" to the gravamen of the underlying Delaware Actions, it should not endorse the Custodian's proposed, overly aggressive basis for the Subpoenas.

As an initial matter, the Custodian relies on a strained interpretation of the meaning of the Sale Process Order's cooperation requirement. The Sale Process Order—which is the authority

invoked by the Custodian for these Subpoenas—lays out several steps the Custodian may take in order to sell the company. These steps include creating marketing materials, obtaining company information or documents, and establishing a data room—and then it states that the Custodian's actions "are binding upon the directors, stockholders, officers, employees, consultants and agents of the Company," and that all of those individuals "shall *cooperate fully* with the Custodian in the performance of *his duties under the Order*." Ex. 4 (July 18, 2016 Sale Process Order) at ¶ 12 (emphasis added). In context, this cooperation requirement appears designed to ensure that employees, among other things, provide company documents and supply the necessary data and information for a data room and marketing materials.

Indeed, this is how courts have interpreted cooperation obligations in similar contexts historically. Orders appointing custodians and receivers typically include cooperation provisions, and courts have generally understood them to require providing information and access to company records. In *In re McCoy*, for instance, the Delaware Supreme Court appointed receivers to the law practice of a suspended attorney in order to notify and protect the interests of the clients, and the order appointing the receivers required the suspended attorney's "cooperation." *In re McCoy*, 767 A.2d 191, 194 (Del. 2001). The Delaware Supreme Court determined that the suspended attorney violated that requirement by failing to respond to the receiver's communications, failing to provide the receivers with active client files and accounting records, and failing to provide access to the law office so that the receivers could readily obtain client files. *See also Matter of Ramunno*, No. 42, 2017, 2017 WL 448598 at *1

(Del. Jan. 25, 2017) (obligation to cooperate with receiver requires providing access to books and records).[10]

Here, the Custodian does not argue that any employees refused to do something the Custodian asked them to do, like provide information about the company or assist with a data room. Nor does the Custodian argue that anyone violated any of the various specific prohibitions set forth in the Sale Process Order. *Cf.* Ex. 4 (July 18, 2016 Sale Process Order) at ¶ 5 (prohibiting Elting and the Shawes from "participat[ing] in any presentations to third-party bidders"). Instead, the Custodian stretches the phrase "cooperate fully" well beyond its intended meaning, untethers it from any obligation arising in the Sale Order, and argues that the purported "leaks" violate the "cooperate fully" requirement because they generally "try to harm the sales process, and intimidate potential acquirers and the advisors." Ex. 18 (July 31, 2017 letter from Jennifer C. Voss to Chancellor Bouchard) at 2. We are not aware of any authority that supports construing a cooperation requirement so broadly in support of a subpoena request. And, of course, the "powers of a custodian for a corporation are not [] unlimited." *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 240 (Del. 1982); *see also id.* ("[t]he involvement of the Court of Chancery and its custodian in the corporation's business and affairs should be kept to a minimum and should be exercised only insofar as the goals of fairness and justice . . . require").

In addition, the Custodian's position that any purported disclosures here constituted a violation of the cooperation requirement relies on a premise that cannot be established. The premise, according to the Custodian, is that the alleged disclosures harmed the sales process and

[10] *See also, e.g.*, *Zweifel v. Zweifel*, No. A12-1212, 2013 WL 1788512 (Minn. Ct. App. Apr. 29, 2013) (obligation to cooperate with receiver appointed to sell home after dissolution of marriage violated by refusing to provide a key and failing to sign the listing agreement); *Yankee Gas Servs. Co. v. DaSilva*, 593 A.2d 158, 160 (Conn. App. Ct. 1991) (duty on an owner, lessor, or agent whose property is under receivership to cooperate and disclose information to the receiver because "[t]his construction enables an effective receivership"); *In re Ridley*, 115 B.R. 731, 737 (D. Mass 1990) (debtor failed to cooperate by failing to keep and provide appropriate financial records).

intimidated potential acquirers and the advisors (notwithstanding that much of the information occasioning the Subpoenas has been public for months). Ex. 18 (July 31, 2017 letter from Jennifer C. Voss to Chancellor Bouchard) at 1-3. While publishing the Custodian's fees and the identity of his advisors and their fees may be embarrassing to the Custodian, it has not and cannot be established that publicizing that information (beyond what is already public) has had or would have *any* impact on the sale process. Disclosing the name of a previously-identified bidder of a billion-dollar company that has experienced two decades of growth is highly unlikely to harm the sale process in any way. The Custodian's conclusory statements do nothing to establish the premise, *id.*; Ex. 20 (August 1, 2017 Teleconference Transcript) at 4:21-23, and there is no evidence that a single advisor or potential acquirer has been "intimidated," or that the sales process has otherwise been harmed. To the contrary, the Custodian has recently acknowledged that "the sales process continues to quickly unfold." Ex. 18 (July 31, 2017 letter from Jennifer C. Voss to Chancellor Bouchard) at 5. And a recent article indicates that the sale process is moving into the second round of bidding with multiple bidders. Ex. 9 (August 15, 2017 Mergermarket article).

Indeed, the Custodian cannot establish the essential premise of his purported position because much of the allegedly improperly disclosed information that he now claims has threatened the sale process was already public before Citizens published its press releases and advertisement. For instance, news articles had already reported that Lionbridge was a potential bidder, and the fact that Lionbridge—one of TransPerfect's primary competitors—would be a

potential bidder for TransPerfect was entirely unsurprising.[11] The Custodian himself had already disclosed his fees publicly in a filing responding to an AP reporter's request for information on his fees, and the Delaware court thereafter disclosed his monthly fees and expenses in orders approving them. *See* Ex. 10 (March 15, 2017 Custodian's filing in response to AP reporter's request) at 5; Exs. 11-15 (Orders listing Custodian's monthly fees). And the identity of several of the Custodian's advisors had previously been publicly disclosed in publicly-filed court documents. *See* Ex. 3 (June 21, 2016 letter from Chancellor Bouchard to counsel) approving the Custodian's proposed plan of sale) (identifying Houlihan Lokey Capital, Inc., Alvarez & Marsal, and Grant Thornton as advisors); *see also* Ex. 16 (Philip Shawe's Brief in Support of His Motion to Disqualify Ronald S. Greenberg as Trial Counsel (February 12, 2015)) (identifying Thomas Pennell as a "long-time consultant for TransPerfect"); Ex. 17 (February 19, 2015 Pretrial Conference Transcript) (identifying Pennell as "an advisor to the company"). Although the Custodian's advisors' fees have not previously been made public, there is no evidence that making those public has deterred any advisors. In any event, the Custodian's fees are public and there are no meaningful grounds for treating the fees of his advisors differently. They should be submitted to the court for approval, and those submissions then would be judicial documents to which the public would have a right of access. *See, e.g.*, *United States v. Erie Cnty., N.Y.*, 763 F.3d 235, 239-40 (2d Cir. 2014); *NewRadio Grp. LLC v. NRG Media LLC*, No. 4951-VCL, 2010 WL 935622, at *1 (Del. Ch. Jan. 27, 2010); Del. Ch. Ct. R. 5.1; Ex. 4 (July 18, 2016 Sale

[11] *See, e.g.,* n.5 & Ex. 8 (February 8, 2017 Cronica Global article). Indeed, an August 2015 filing noted that "competitors of TransPerfect" would be "likely buyers of the business." *See* Ex. 27 Philip R. Shawe's Brief in Support of Application for Entry of Judgment or Certification of An Interlocutory Appeal, and Motion for A Stay Pending Appeal, *In re Shawe & Elting LLC*, Nos. 9661, 9686, 9700, 10449, 2015 WL 5086546, at 9 (Del. Ch. Aug. 24, 2015) (raising the concern that an auction may allow competitors the ability to examine TransPerfect's books and records because they would likely be bidders). *Cf.* Ex. 28 (Katia Savchuk, *Inside the Nasty Corporate Divorce Between Ex-Lovers Who Built a Company Worth Nearly $1 Billion*, Forbes (May 25, 2016) (head of RWS Group, a major TransPerfect competitor, stating that RWS would "'look closely' at bidding for TransPerfect").

Process Order) at ¶ 14. Indeed, in other cases, the Delaware Court of Chancery has required petitions for approval of advisors' fees and expenses. *See, e.g.*, *In re Carlisle Etcetera LLC*, No. 10280-VCL, 2015 WL 10371435, at *2 (Del. Ch. May 4, 2015) (requiring petition to approve "fees and expenses incurred by the Custodian and his advisors").

The merits of the Delaware Actions have been resolved, and the sale process is in the second round of bidding, *see* Ex. 9 (August 15, 2017 Mergermarket article). At this point, "rather than sharpening the issues and reducing delay and prolixity," identifying individuals for allegedly improper disclosures concerning fees charged by the Custodian and his advisors, and one completely unsurprising potential bidder, would "focus 'undue attention to the collateral matter to the detriment of the main issue.'" *Blittner v. Berg & Dorf*, 138 A.D.2d 439, 440–41, 525 N.Y.S.2d 858, 859 (2d Dep't 1988) (affirming a decision to quash a subpoena requesting deposition of individual who notarized an affidavit concerning the execution of an affidavit he notarized). This would be true if the Subpoenas were focused on obtaining only the information necessary to identify the potential sources of information,[12] and it is even more true here because of the enormous breadth of information the Subpoenas request. In addition to seeking information on the sources for Citizens' press releases and advertisement, the Subpoenas demand, among other things, all communications between Coffey or Tusk and any current or former TransPerfect employee, director or shareholder, or any of their agents; all documents regarding Citizens' funding; and all documents concerning any payments Coffey or Tusk have received on behalf of their client. These demands have nothing to do with uncovering the sources of the allegedly improperly disclosed information. Rather, they are a fishing expedition

[12] *See Stephen-Leedom Carpet Co. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 101 A.D.2d 874, 578, 476 N.Y.S.2d 135, 138 (1984) (denying discovery that would lead to "a hunt for the instigator of the hoax [whereby plaintiff deposed a fake employee] rather than a determination of the issues presented by the pleadings" in an insurance dispute).

that can only lead to more peripheral skirmishes with TransPerfect employees, Citizens, Coffey, and Tusk.

Because the Subpoenas seek information that is irrelevant to the underlying action and to the sale of the company, and because the Custodian has failed to make any showing to the contrary, the Court should grant Petitioners' motion to quash.

3. Enforcing compliance with the TransPerfect Employee Handbook cannot justify the Subpoenas

The Custodian's July 31 letter to the Court of Chancery also suggested that the demands in the Subpoenas are necessary to allow the Custodian to enforce compliance with certain confidentiality provisions in the TransPerfect Employee Handbook. Ex. 18 (July 31, 2017 letter from Voss to Chancellor Bouchard) at 3-4. If true, such a suggestion would be a completely inappropriate use of a subpoena. Even if responses to the Custodian's Subpoenas were relevant to the enforcement of certain internal confidentiality provisions, such information would be in no way "material and necessary in the prosecution or defense *of an action*." CPLR § 3101(a) (emphasis added). There is no action pending related to a violation of such internal TransPerfect procedures. In any event, the Custodian should not be allowed to subject the foreign nonparty Petitioners to the burden of discovery simply to help promote enforcement of TransPerfect's internal operating procedures.

II. Alternatively, the Court Should Enter a Protective Order Denying or Substantially Limiting the Subpoenas

In the alternative, this Court should exercise its broad discretion to enter a protective order denying the Custodian's inappropriate use of the Subpoenas. If the Court does not quash the Subpoenas, in no case should it allow the Custodian's requested discovery into issues beyond the specific sources of information for Citizens' press releases and advertisement.

A. Legal Standard

CPLR § 3103 provides that a court may "on its own initiative" or "on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" in order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." CPLR § 3103(a); *see also Hudson City Sav. Bank v. 59 Sands Point, LLC,* No. 08768/13, 2017 WL 3401129 (2d Dep't Aug. 9, 2017) (affirming decision quashing subpoenas on nonparties and granting protective order against further discovery from nonparties).

This Court has broad discretion to supervise and limit disclosure and "must balance the parties' competing interests" in determining whether discovery is improper. *Cnty. of Suffolk v. Long Island Power Auth.*, 100 A.D.3d 944, 946, 954 N.Y.S.2d 619, 622 (2d Dep't 2012) (internal quotation marks and citations omitted); *see also Del Gallo v. City of New York*, No. 107409/11, 2014 WL 2745696, at *2 (Sup. Ct. June 17, 2014) (noting that the party seeking a protective order bears the burden of showing that discovery is improper). Where "a majority of the disclosure demands [are] overbroad, duplicative, immaterial or improper, a trial court may vacate, rather than prune, the entire demand." *Dicostanzo v. Schwed*, 146 A.D.3d 1044, 1045-1047, 45 N.Y.S.3d 625, 627-28 (3d Dep't 2017) (affirming the trial court's grant of a protective order vacating plaintiff's request for production of documents where "several of plaintiff's demands were duplicative or unduly vague or overly broad").

B. This Court Should Enter a Protective Order Denying the Requested Discovery

In the event that this Court does not quash the Subpoenas, it should grant a protective order vacating them. As an initial matter, it bears repeating that the information sought by the

Subpoenas—in the words of the Custodian's counsel—is information "relate[d] to the Citizens campaign," and not to the main issue in the Delaware Actions. Ex. 20 (August 1, 2017 Teleconference Transcript) at 5:12-13. This background must be taken into consideration in balancing the burdens imposed by these discovery requests. *See In re R.J. Reynolds Tobacco Co.*, 136 Misc. 2d 282, 285, 518 N.Y.S.2d 729, 732 (Sup. Ct. 1987) ("If the production of the material would become oppressive and unreasonably burdensome, the court, in balancing the hardships, should consider whether there are other sources for obtaining the material[.]").

Not only are the Subpoenas irrelevant to (and a distraction from) the merits of any underlying action and the Sale Process Order, *see supra* I.B., they are also dramatically overbroad. The Custodian has claimed that discovery is necessary to "[i]dentify the person(s) responsible for leaking confidential sales-related information." Ex. 18 (July 31, 2017 letter from Jennifer C. Voss to Chancellor Bouchard) at 2-3. But the Subpoenas go far beyond seeking information identifying those persons. In addition to requesting that information, the Subpoenas require nonparty Petitioners to produce all documents and communications concerning: the consultants and advisors hired by the Custodian and/or TransPerfect (Doc. Req. Nos. 1, 2), potential acquirers of TransPerfect (Doc. Req. Nos. 3, 4), payments made to Petitioners on behalf of Citizens (Doc. Req. No. 8), and funding sources for Citizens (Doc. Req. No. 9). In addition, the Subpoenas include catch-all requests for *all* documents and communications exchanged between Petitioners and "any current or former employee, director or shareholder of [TransPerfect], or any agent of a current or former employee, director or shareholder of [TransPerfect]." (Doc. Req. No. 7). None of these requests are necessary to identify the TransPerfect employees the Custodian wishes to identify.

The Subpoenas are also duplicative, as they seek overlapping documents. For example, Document Request No. 7 (the catch-all request) plainly encompasses Document Request Nos. 2 and 4, which request "[a]ll Documents and Communications exchanged between You and any current or former employee, director or shareholder of [TransPerfect] or any agent of a current or former employee, director or shareholder of [TransPerfect]" regarding consultants or advisors hired by the Custodian or [TransPerfect] (Request No. 2) and regarding any potential acquirer of TransPerfect (Request No. 4). Exs. 1-2 (Subpoenas). In addition, these requests are excessively burdensome as they would require Petitioners to identify, collect, and review all relevant communications with any of TransPerfect's more than 4,000 employees, several hundred of whom are members of Citizens on whose behalf Petitioners have been working. *See Brodsky v. New York Yankees*, 26 Misc. 3d 874, 889, 891 N.Y.S.2d 590, 595, 601 (Sup. Ct. 2009) (quashing a subpoena because it was overbroad and unduly burdensome); *see also Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 344, 662 N.Y.S.2d 450, 455 (1st Dept. 1997) (finding a subpoena "patently overbroad, burdensome, and oppressive" and noting that the subpoena did not "call for the files of specific officers of the company or for documents regarding limited or specifically defined subjects"); *New York State Comm'n on Gov. Integrity v. Congel*, 142 Misc. 2d 9, 15-16, 535 N.Y.S.2d 880, 886 (Sup. Ct. 1988) (quashing a subpoena because it was overbroad and unduly burdensome insofar as it demanded production of "all information" regarding "contacts with known persons involved in the election" and "all records concerning the organization").

When "discovery demands are overbroad," as they are here, New York courts routinely "vacate the entire demand rather than … prune it." *Berkowitz v. 29 Woodmere Blvd. Owners', Inc.*, 135 A.D.3d 798, 799, 23 N.Y.S.3d 352, 354 (2d Dep't 2016); *see also Bell v. Cobble Hill*

Health Ctr., Inc., 22 A.D.3d 620, 621, 804 N.Y.S.2d 362, 363 (2d Dep't 2005) (internal quotation marks and citations omitted) ("Where, as here, 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 to prune it."). "The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one." *New York Cent. Mut. Fire Ins. Co. v. Librizzi*, 106 A.D.3d 921, 921, 965 N.Y.S.2d 183, 184 (2d Dep't 2013).

Vacating both Subpoenas in their entirety is particularly appropriate here because they only serve to create an "unreasonable annoyance, expense, embarrassment, disadvantage, [and] prejudice" to Tusk and Coffey as a consequence for the assistance they provided to TransPerfect employees and Delaware citizens in voicing their grievances about the sale process. Moreover, the Subpoenas would have the effect of silencing that speech, and this Court should protect against the "danger that subpoenas may be used to intimidate or harass" such speakers. *See Parkhouse v. Stringer*, 12 N.Y.3d 660, 666, 912 N.E.2d 48, 52, 884 N.Y.S.2d 216, 220 (2009). The harm experienced by Petitioners—and by Citizens and its members—far outweighs the materiality of the demanded disclosure. *See Bucaretzky v. Swersky*, 151 Misc. 2d 136, 137, 572 N.Y.S.2d 285, 285 (Sup. Ct. 1991).

C. Alternatively, This Court Should Enter a Protective Order Limiting The Requested Discovery

In the event that this Court does not deny the requested discovery entirely, it should substantially limit the requested discovery. Even if this Court allows discovery on the core information requested, *i.e.*, the sources of information for Citizens' press releases and advertisements sought through Document Request Nos. 5 and 6 (and for the reasons discussed

above this Court should not allow any of the discovery requests to proceed), in no event should it allow any other requests to proceed.

If discovery on those sources is allowed, then Request Nos. 1 (communications with Citizens regarding the Custodian's advisors), 2 (communications with TransPerfect employees, directors, or shareholders regarding the Custodian's advisors), 3 (communications with Citizens regarding any potential bidders), 4 (communications with TransPerfect employees, directors, or shareholders regarding potential bidders), and 7 (all communications with TransPerfect employees, directors, or shareholders) are entirely unnecessary, as they seek information in order to identify to those sources. Moreover, as discussed above, Request No. 7 is excessively broad and duplicative of Request Nos. 2 and 4.

In addition, Requests Nos. 8 (all documents regarding payments the Petitioners received on behalf of Citizens) and 9 (all documents regarding funding sources for Citizens) should be eliminated. The information these requests seek has nothing to do with identifying the sources of information for the press releases and advertisement, and does not otherwise bear on the underlying Delaware Actions, or even on the Custodian's sale process. In addition, these requests improperly seek confidential and proprietary business information. *See, e.g.*, *DeLeonidas*, 136 A.D.3d at 558, 25 N.Y.S.3d at 186 ("the financial documents of nonparties ... are not only irrelevant, but are not subject to discovery on the basis of their confidential and private nature") (quotation marks omitted).[13] And, by seeking a list of supporters of Citizens, the

[13] *MBIA Ins. Corp. v. Credit Suisse Secs. (USA) LLC*, 103 A.D.3d 486, 487, 960 N.Y.S.2d 25, 26 (1st Dep't 2013) (finding the disclosure of "extensive amounts of duplicative, personal and confidential financial information" unduly burdensome on the responding non-parties where party seeking disclosure failed to make strong showing of necessity, demonstrate that the information is unavailable from other sources, and establish the relevance of the requests); *see also Saratoga Harness Racing Inc. v. Roemer*, 274 A.D.2d 887, 889, 711 N.Y.S.2d 603, 605 (3d Dep't 2000) (holding trial court erred in compelling disclosure of financial records that "contain information of a confidential and private nature").

requests implicate those supporters' First Amendment rights to the freedom of association. *Evergreen Ass'n, Inc. v. Schneiderman*, 54 N.Y.S.3d 135,145 (2d Dep't 2017) (limiting subpoena that implicated First Amendment freedom of association rights of nonprofit organization's staff and others seeking to be associated with it).

Finally, the request to depose Coffey should be rejected, as it is nothing more than a thinly veiled effort to annoy, harass, and intimidate him from further efforts to advocate on behalf of Citizens. Where, as here, the information sought through an individual's deposition would be potentially cumulative, the request for a deposition should be denied. *See, e.g., O'Brien v. Vill. of Babylon*, No. 2015-11910, 2017 WL 3273204, at *1 (2d Dep't Aug. 2, 2017) (affirming decision to grant protective order precluding deposition where subpoenaing party could not show deposition would add to the discovery already collected). Petitioners therefore respectfully request that the Court deny the Coffey deposition.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court quash the Subpoenas. In the alternative, Petitioners request that the Court grant a protective order denying the discovery requests, or, at a minimum, substantially limiting the document requests and precluding the Coffey deposition.

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