SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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ERIK GARLINGTON,

Plaintiff,

- v -

NICOLE AUSTIN and MARK BURSTINER,

Defendants.

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INDEX NO. 157700/2025

MOTION DATE 07/16/2025, 08/01/2025, N/A, 09/05/2025, N/A

MOTION SEQ. NO. 001 002 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 13, 21, 23
were read on this motion for PREL INJUNCTION/TEMP REST ORDR.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 30, 36, 53, 54
were read on this motion for COMPLEX.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 24, 25, 26, 27
were read on this motion for SANCTIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 31, 32, 33, 34, 35, 37
were read on this motion for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 49, 50, 51, 52
were read on this motion to AMEND CAPTION/PLEADINGS.

Law Office of Richard A. Altman, New York, NY (Richard A. Altman of counsel), for plaintiff.
Nicole Austin and Mark Burstiner, defendants pro se.

Gerald Lebovits, J.:

In this action, plaintiff, Erik Garlington, brings claims for defamation, violations of Civil Rights Law §§ 50 and 51, and intentional infliction of emotional distress against defendants Nicole Austin (his former spouse) and Mark Burstiner. (*See* NYSCEF No. 1.) Plaintiff, a musician, alleges that defendants made defamatory statements that accuse plaintiff of criminal

conduct, including rape, sexual assault, grooming minors, sex trafficking, serial killing, and felonies. (*See id.* at ¶¶ 1, 22, 30, 36.)

Plaintiff asserts that defendants created a website titled "Known Rapist Erik Garlington" and posted allegedly defamatory statements on social media platforms like YouTube (a six-hour video). (NYSCEF No. 1 at ¶¶ 33–36.) Plaintiff further alleges that defendants repeated the statements to colleagues, employers, and the press. (*See id.* at ¶¶ 22, 25–29, 31.) Plaintiff represents that defendants "posted his home address online and left taunting messages promising violence," causing him to fear for his and his partner's safety. (NYSCEF No. 3 at ¶ 19 [plaintiff's affidavit].) Plaintiff asserts that the statements harmed his reputation and his professional activities as a musician. (NYSCEF No. 1 at ¶¶ 2–5, 19, 29.)

On motion sequence 001, plaintiff moves under CPLR 325 (b) to transfer to this court the action he brought pro se in Queens Civil Court (*Garlington v Austin*, Index No. CV-024646-24/QU). He also seeks a preliminary injunction enjoining defendants from making further defamatory statements during this action. (*See* NYSCEF No. 13 at ¶¶ 1–2.) The motion is granted in part and denied in part.

On motion sequence 002, defendants move for 23 forms of relief, including transfer of the pro se action, an ordering prohibiting plaintiff from contacting defendants; travel limits, discovery sanctions, joinder of three anonymous alleged victims, attorney fees, a filing injunction, and for this court to refer plaintiff for criminal investigation. (*See* NYSCEF No. 20 [order to show cause].) The motion is denied.

On motion sequence 003, defendants move under 22 NYCRR 130-1.1 for sanctions against plaintiff and his counsel. They also seek attorney fees and to strike plaintiff's reply affirmation on motion 001 as untimely,[1] to refer plaintiff's counsel disciplinary authorities, and to dismiss plaintiff's underlying motion. (NYSCEF No. 24 [order to show cause].) The motion is denied.

On motion sequence 004, plaintiff moves for a protective order under CPLR 3103 (a) and to vacate defendants' July 2025 discovery demands. The motion is granted.

On motion sequence 005, defendants move to amend the caption; deny removal of the Queens action and prevent a stay of that action pending denial of removal; and for sanctions against plaintiff and his attorney. The motion is denied.

The motions are consolidated for disposition.

[1] Plaintiff filed the reply six minutes late without seeking leave or explaining the delay. The delay is trivial and caused no prejudice. The court considers the reply.

DISCUSSION

I. Motion Sequence 001: Transfer and Preliminary Injunction

Plaintiff seeks two forms of relief on this motion: to transfer the related Queens Civil Court pro se action to this court and to enjoin defendants from making additional defamatory statements. (NYSCEF No. 8.) Defendants consent to the transfer but oppose the injunctive relief.

A. Removal to Supreme Court

CPLR 325 (b) permits Supreme Court, on motion, to remove an action to itself when "the court in which an action is pending does not have jurisdiction to grant the relief to which the parties are entitled." Plaintiff moves to transfer to this court his pending Queens Civil Court pro se action (*Garlington v Austin et al*., Index No. CV-024646-24/QU). He argues that Civil Court lacks jurisdiction to grant the injunctive relief he seeks and that it lacks jurisdiction over this action, because plaintiff's seeks damages exceeding $50,000. Defendants do not oppose.

This branch of plaintiff's motion is denied. Plaintiff bases his transfer request entirely on his complaint in *this* action. But the damages and relief plaintiff seeks in *this* action are irrelevant to his request to remove the *Civil Court action*. Plaintiff would have to make a showing for removal based on his submissions in the Civil Court action. Moreover, plaintiff identifies neither the relief nor the amount sought in Civil Court action, nor any calculation or evidentiary showing of increased damages.

B. Preliminary Injunction

Plaintiff seeks a preliminary injunction enjoining defendants from making false accusations against him. (*See* NYSCEF No. 8 at 2 [order to show cause]; NYSCEF No. 6 [memorandum of law].) A party seeking a preliminary injunction must show "(1) the probability of success on the merits; (2) the danger of irreparable harm in the absence of an injunction; and (3) a balance of equities in its favor." (*Nobu Next Door, LLC v Fine Arts. Hou's., Inc*., 4 NY3d 839, 840 [2005].)

Plaintiff argues the challenged statements are defamation per se—false accusations of serious crimes—and therefore fall outside First Amendment's protection. Plaintiff points to a fake website defendants created, defendant's six-hour YouTube video, social-media posts, and direct emails to festival organizers and industry contacts that have caused ongoing reputational and economic harm. He says that he cannot be fully remediated by money damages. Plaintiff asserts that the defendants' accusations are false, defamatory per se, and serve no public interest.

Defendants contend the requested preliminary injunction is an unconstitutional prior restraint on protected speech. They argue that plaintiff seeks to silence commentary about alleged domestic violence and that the heavy presumption against prior restraints requires denial of the injunction. Defendants argue that granting the injunction would chill public discourse.

1. Likelihood of Success

Plaintiff argues that his defamation per se claim will succeed on the merits. Defendants respond that the statements are substantially true and therefore that plaintiff is required to prove actual malice.[2] (*See* NYSCEF No. 21 at 2–3.) Plaintiff counters that the purported truth of the statements is not a basis to deny interim relief and that anyway he has alleged the falsity of those statements in his complaint and affidavit on this motion. (*See* NYSCEF No. 23 at ¶ 7.)

a. Defamation and Defamation Per Se

To make out a case for defamation, a plaintiff must prove that the defendant made "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].) Defamation per se encompasses statements that charge a person with a serious crime or injure that person in their profession. (*See Liberman v Gelstein*, 80 NY2d 429, 435 [1992].)

b. Prior Restraint on Speech

Prior restraints are severe intrusions on First Amendment rights. Any form of prior restraint carries a strong presumption against its constitutional validity. (*Brummer v Wey*, 166 AD3d 475, 476 [1st Dept 2018].) Therefore, "[a] party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition and, to do so, must show that the speech sought to be restrained is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." (*Id.* [internal citations and quotation marks omitted].)

Speech may be enjoined when it (1) "communicate[s] a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" (*id.* [internal quotation marks omitted]); (2) is "considered part and parcel of a course of conduct deliberately carried on to further a fraudulent or unlawful purpose" (*Rosenberg Diamond Dev. Corp. v Appel*, 290 AD2d 239 [1st Dept 2002] [internal quotation marks omitted]); or (3) risks harm to recognized personal or business reputation or privacy (*see Dennis v Napoli*, 148 AD3d 446, 447 [1st Dept 2017] [holding that communications that "cause injury to plaintiff's "reputation, jeopardize her employment, and otherwise unnecessarily intrude upon her right to privacy" are not constitutionally protected]; *Bingham v Struve*, 184 AD2d 85, 89 [1st Dept 1992]).[3] In addition, "[a]ccusations of criminal or illegal activity, even in the form of an opinion, are not constitutionally protected." (*Angel v Levittown Union Free Sch. Dist. No. 5*, 171 AD2d 770, 772 [2d Dept 1991].)

[2] Defendants also argue that the Anti-SLAPP statute applies. But their passing reference to the Anti-SLAPP statute does not trigger its protections. Because defendants did not move under CPLR 3211(g), this court does not address Anti-SLAPP on this preliminary-injunction motion.

[3] This list is not necessarily exclusive.

c. Public/Private Figure and Scienter

Whether plaintiffs are public figures turns on whether they have achieved pervasive fame or have voluntarily injected themselves into a particular public controversy to influence its outcome. (*See James v Gannett Co*., 40 NY2d 415, 422–23 [1976].) The inquiry is contextual: "Certain individuals may be considered public figures for all purposes while others may invite publicity only with respect to a narrow area of interest and may fairly be considered public figures only where the alleged defamation relates to the publicity they sought." (*Gottwald v Sebert*, 40 NY3d 240, 251 [2023] [internal quotation marks omitted].) Limited-public-figure status is achieved "through some purposeful activity, by which the individual has thrust themself into the public spotlight and sought a continuing public interest in [their] activities." (*Id.* [internal quotations marks omitted].)

If plaintiff is a public figure, then "he must prove the allegedly defamatory statements were made with 'actual malice.'" (*Id.*) To prove actual malice, a plaintiff must "prove by clear and convincing evidence that each statement was made with either knowledge that it was false or reckless disregard for the truth." (*Id.* [internal quotation marks omitted].) In contrast, "the accepted standard for private figures is negligence." (*Id.*)

d. Analysis

Plaintiff is a private figure. His public presence is confined to his artistic work as a singer and guitarist. Nothing before the court suggests that he has sought publicity beyond that narrow music-industry sphere. The challenged statements, however, do not concern his music career. Accusations that he is a rapist, a felon, or a serial killer, or that he groomed minors, sexually trafficked his partner, or engaged in other violent or predatory conduct, bear no demonstrated connection to the subject on which he has sought any public attention. At this stage, there is no evidence that plaintiff has spoken publicly about, invited scrutiny of, or otherwise thrust himself into public debate concerning criminality, mental-health conditions, or intimate-partner behavior—topics wholly distinct from the field in which he has any arguable public presence.[4] Accordingly, plaintiff need not show that defendants acted with actual malice when making their statements to be successful on his defamation claim.

Plaintiff alleges that defendants published false statements accusing him of rape, sexual assault, grooming minors, murder, and trafficking. He submits screenshots of defendants' posts, emails, and social-media communications containing these accusations, as well as the website titled "Known Rapist Erik Garlington." (NYSCEF No. 4.) He also provides emails that defendant Mark Burstiner allegedly sent to music-festival organizers and professional contacts repeating the accusations and urging them to cut ties with him. (*See id.*) Plaintiff alleges that the statements are false and have caused reputational and professional harm.

[4] A small subset of statements arguably touches plaintiff's musical career—such as claims that he "stole songs," that "a colleague in the music industry, Bartees Strange, [did not] okay a lyric referencing him," or that "his band was dropped by all representation." (NYSCEF No. 1 at ¶ 36.) Those statements fall within the limited sphere in which plaintiff has sought publicity—the music industry. The court therefore declines to impose an injunction against statements of that nature.

Defendants argue that the statements are substantially true. However, the materials they submit—largely private communications and narrative exchanges—do not provide legitimate evidentiary basis supporting the criminal accusations.[5] (*See* NYSCEF No. 15.) Courts have rejected similar attempts to justify serious criminal allegations with uncorroborated or unsupported assertions. (*See Bingham*, 184 AD2d at 89.)

Plaintiff has demonstrated a likelihood of success on the merits of his defamation per se claim.

2. Irreparable Harm

Irreparable harm exists where the injury cannot be adequately quantified and therefore compensated by money damages. (*See U.S. Re Companies, Inc. v Scheerer*, 41 AD3d 152, 155 [1st Dept 2007].)

The record reflects that defendants directed, through emails and other direct communications, their accusations of rape, murder, sexual assault, grooming minors, and trafficking to plaintiff's professional contacts and colleagues. Plaintiff also attests that defendants contacted his family and friends with similar accusations and posted his home address online—highly intrusive conduct. In addition, Burstiner's messages to plaintiff's professional acquaintances asking whether they intended to cut ties with him demonstrate a deliberate effort to interfere with plaintiff's professional relationships and livelihood.

Courts have recognized that targeted outreach to third parties with serious, unverified accusations causes reputational, professional, and emotional harm that cannot be remedied by money damages. (*See Bingham*, 184 AD2d at 89–90; *Dennis*, 148 AD3d at 446–447; *Nira v Hossain*, 2024 NY Misc LEXIS 61100, *8 [Sup Ct, Nassau County 2024].) On this record, plaintiff has shown that continued direct contact with his personal and professional network would inflict irreparable injury.

3. Balance of Equities

The balance of equities tips in plaintiff's favor. The harm he might suffer due to the promulgation of criminal accusations against him outweighs any injury defendants might incur due to the injunction. (*See Nira v Elias Hossain*, 2024 NY Misc LEXIS 61100, *8 [Sup Ct, Nassau County 2024].) Moreover, the relief plaintiff seeks on this motion is limited. Plaintiff does not seek removal of defendants' website or other existing public postings in Motion 001. He seeks "a preliminary injunction against further defamatory actions or statements by defendants of and concerning the plaintiff, during the pendency of this action." (NYSCEF No. 8 at 2 [order to show cause].)

[5] Defendants also try to invoke the litigation privilege and pre-litigation privileges. But neither applies. The statements here were not made while a judicial proceeding was ongoing or made in anticipation of good-faith litigation. (*See Gottwald*, 40 NY3d at 253-254.)

Defendants are therefore enjoined from directly contacting plaintiff's professional contacts, colleagues, family, or friends by email, message, telephone, or other direct communication and from publishing or posting statements which falsely accuse plaintiff of rape; grooming or abusing minors; engaging in nonconsensual sexual conduct or sex trafficking; being a felon; being a serial killer; or having killed or caused the death of another person.

II. Motion Sequence 002

On motion sequence 002 defendants seek what they say is emergency injunctive relief. Defendants' order to show cause enumerates 23 requested forms of relief, including an order prohibiting plaintiff from contacting them, removal of online content, travel limitations, surrender of plaintiff's passport, compelled discovery, sanctions, joinder of anonymous individuals, and referrals for criminal investigation. Plaintiff opposes the motion except for the transfer request, which this court already denied on motion sequence 001.

The branch of defendants' motion to deny plaintiff's motion for a prior-restraint injunction (item 2) is denied as academic given this court's conclusions on motion sequence 001.

The branch of defendants' motion to join three anonymous individuals, who, defendants say, experienced sexual misconduct by plaintiff (item 3), is denied. Under CPLR 1001 (a), only "persons who ought to be parties if complete relief is to be accorded" or who "might be inequitably affected by a judgment in the action" must be joined. Defendants seek to add three individuals as parties, asserting that they "have come forward but require anonymity due to documented risk of retaliation." (NYSCEF No. 20 at ¶ 3.) Defendants do not identify these alleged victims or substantiate any connection between them and this case. Without basic identifying information, the court cannot determine whether they ought to be parties or might be inequitably affected by the judgment.

The branch of defendants' motion to enjoin plaintiff from threatening or harassing defendants; mobilizing third parts to do; and requiring plaintiff to use correct names and pronouns (item 4) is denied. (NYSCEF No. 20 at 2.) The record contains no evidence of any true threats. The cited statements—that "a million people from here to Japan will know your names and faces"—are rhetorical commentary, not threats of unlawful conduct. The references to "harassment," "mobilization," and "harm" rest on speculative interpretations of online speech, not on any imminent or concrete danger. There is likewise no showing of any actual "misgendering" or any legally cognizable injury arising from it. New York recognizes no tort of "misgendering."

Defendants also seek orders requiring the removal of publications and enjoining plaintiff from posting about defendants on social media (items 7 and 8). They seek removal of plaintiff's May 21, 2025, Instagram post of rap lyrics: "He gon' end up murdered, he gon' end up dead" and "Every time I get a new bag, put it on a opp head." (NYSCEF No. 20 at 2.) Defendants provide insufficient context to construe plaintiff's posting of those lyrics as a threat toward them. That plaintiff posted the lyrics the night before a court appearance is insufficient without more.

Defendants also seek to prohibit plaintiff from "mobilizing third parties" as shown by his statement that "a million people, from here to Japan, know your names, faces" (item 9). (NYSCEF No. 20 at 2.) Read within the context of the email in which it originates, however, that statement does not sound in threats, imminent harm, or defamation. (*See* NYSCEF No. 15 at 90 pdf pagination].)

The branches of defendants' motion for criminal orders of protection and an order prohibiting plaintiff from contacting defendants (items 5 and 6) are denied. This is a civil action, not a criminal or family-court one.

The branch of defendants' motion to enjoying "[p]laintiff from surveillance or monitoring of Counterclaimants' activities, including but not limited to making statements about their physical reactions or presence at locations" (item 10) is denied. (NYSCEF No. 20 at 3.) Defendants provide no evidence of surveillance. Plaintiff's message to Burstiner that "I heard your hands were TREMBLING when you though I was at your house" is mere hyperbole. (NYSCEF No. 15 at 90 [pdf pagination].)

The branches of defendants' motion to require plaintiff to surrender his passport to this court; to alert the court of any travel outside New York State; to prohibit travel outside the United States; to pose a $100,000 bond; and to refer this matter and transfer this action's docket to the Kings and Queens District Attorney Offices. (items 12, 13, 14, 15, 21, 22) are denied. This court lacks authority to impose the measures defendants seek.

The branch of defendants' motion to compel plaintiff to comply with defendants' discovery demands (items 16 and 17); for an expedited discovery schedule due to plaintiff's threatening conduct (item 18); and CPLR 3126 discovery sanctions (item 19) is denied. The demands at issue, however, appear to be those defendants submitted in the Queens Civil Court action, not here. According to plaintiff, defendants served their discovery requests in this action only 20 days before plaintiff opposed this motion. (*See* NYSCEF no. 20 at ¶ 20.)

The branch of defendants' motion to declare that plaintiff is a vexatious litigant and to enjoin plaintiff from filing future lawsuits against defendants with prior court approval is denied. Defendants identify no history of meritless or spite-motivated litigation by plaintiff that would warrant a filing injunction. There is no record of abusive filings, no judicial finding of frivolous conduct, and therefore no basis to restrict plaintiff's access to the courts. (*Cf. Svatovic v Shabot*, 226 AD3d 608, 609 [1st Dept 2024].) This request is denied.

The branch of defendants' motion for attorney fees (item 20) is denied. Pro se litigants may not recover attorney fees. In addition, this court denies defendants' request that this court order that a violation of an order of protection issued by this court constitutes criminal contempt (item 11). This court has issued no protective order on which to base such relief.

III. Motion Sequence 003

On motion sequence 003 defendants move 22 NYCRR 130-1.1 for sanctions and attorney fees against plaintiff. They also seek to strike plaintiff's reply papers on motion sequence 001 as

untimely, impose monetary sanctions and attorney fees, refer plaintiff's counsel for disciplinary review, and dismiss plaintiff's underlying motion.

Sanctions are unwarranted here. Plaintiff's conduct in this action has not been frivolous.[6] And his reply papers were submitted substantially on time (6 minutes late, in defendants' view). Motion Sequence 003 is denied.

IV. Motion Sequence 004

On motion sequence 004, plaintiff moves under CPLR 3103 (a) to vacate defendants' July 2025 interrogatories, notice of discovery and inspection, and notice to admit. Plaintiff contends the demands are overbroad, intrusive, and improper in form.

CPLR 3103 (a) permits a court to "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device."

Interrogatories must be limited in scope. When interrogatories are "unduly burdensome and prolix as to be oppressive," the proper remedy is vacatur in their entirety, not judicial pruning. (*Mendler v Mendler*, 135 AD2d 469, 470 [1st Dept 1987].) Pruning is the function of counsel, not the court. (*Id*.) A notice to admit is limited to factual matters not in dispute at trial and may not be used to obtain admissions on ultimate issues, legal conclusions, or contested facts. (*Taylor v Blair*, 116 AD2d 204, 205–206 [1st Dept 1986].)

The interrogatories and document demands require narrative explanations, detailed personal and medical histories, decade-old financial and relational information, and hour-by-hour timelines of events. Moreover, they are too broad. The notice to admit is likewise improper. It seeks admissions on disputed events, third-party communications, and defendants' own allegations—matters that fall outside the limited purpose of a notice to admit.

Given the breadth and intrusive nature of the demands and the court's authority under CPLR 3103 (a) to prevent unreasonable annoyance, embarrassment, and prejudice, a protective order vacating the interrogatories, the notice of discovery and inspection, and the notice to admit in their entirety is warranted.

V. Motion Sequence 005

On motion sequence 005, defendants seek (1) to amend the caption of this action to reflect that defendants are also counterclaimants and that plaintiff is a counterclaim defendant; (2) a declaring that the Queens Civil Court action is not stayed pending plaintiff's motion to remove that action to this court; (3) denial of the branch of plaintiff's motion to remove the Queens Civil Court action to this proceeding (*see* motion sequence 001); (4) sanctions against

[6] The court notes that sanctions motions are themselves subject to 22 NYCRR 130-1.1. The parties are cautioned that unsupported or retaliatory sanctions applications may constitute frivolous conduct.

plaintiff and his counsel under 22 NYCRR 130-1.1 due to plaintiff's counsel's alleged referred to defendants sealed criminal proceedings. (*See* NYSCEF No. 49 [proposed OSC].)

The motion is denied. That defendants have brought counterclaims is not reason enough to amend the caption to reflect that they have asserted those counterclaims. The docket itself will reflect that defendants have counterclaims. In addition, given the Queens Civil Court action will not be removed to this court, this court will not stay that action. Finally, this court is unpersuaded that plaintiff and his counsel's conduct warrant sanctions at this juncture. To the extent defendants complain of plaintiff and his counsel's conduct in the Queens proceedings, they may seek relief there.

Accordingly, it is

ORDERED that the branch of plaintiff's motion to transfer the Queens Civil Court action to this court is denied; and it is further

ORDERED that the branch of plaintiff's motion for a preliminary injunction (mot seq 001) is granted to the extent that defendants are enjoined from directly contacting plaintiff's professional contacts, colleagues, family, or friends by email, message, telephone, or other direct communication and from publishing or posting statements which falsely accuse plaintiff of rape; grooming or abusing minors; engaging in nonconsensual sexual conduct or sex trafficking; being a felon; being a serial killer; or having killed or caused the death of another person; and it is further

ORDERED that defendants' motions for injunctive relief and sanctions (mot seqs 002 and 003) are denied; and it is further

ORDERED that plaintiff's motion for a protective order (mot seq 004) is granted, and defendants' interrogatories, document requests, and the notice to admit are vacated; with defendants to serve new versions of these documents on plaintiff within 45 days; and it is further

ORDERED that defendants' motion to amend the caption; deny removal and stay of the Queens action; and for sanctions (mot seq 005) is denied.

05/05/2026
DATE

HON. GERALD LEBOVITS
J.S.C.

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