SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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BDCM FUND ADVISER, L.L.C., f/k/a BLACK DIAMOND CAPITAL MANAGMENET, L.L.C., BLACK DIAMOND CAPITAL HOLDINGS, L.L.C., and STEPHEN H. DECKOFF,

Plaintiffs,

-against-

Index No.: 602116/08
Motion Date: 7/18/12
Motion Seq. No.: 018

JAMES J. ZENNI, JR., ZENNI HOLDINGS, L.L.C., Z CAPITAL PARTNERS L.L.C., Z CAPITAL SPECIAL SITUATIONS FUND L.P., and Z CAPITAL SPECIAL SITUATIONS FUND-A, L.P.,

Defendants.

-and-

JAMES J. ZENNI, JR., ZENNI HOLDINGS, L.L.C., Z CAPITAL PARTNERS L.L.C., Z CAPITAL SPECIAL SITUATIONS FUND L.P., and Z CAPITAL SPECIAL SITUATIONS FUND-A, L.P.,

Counterclaim Plaintiffs,

-against-

BDCM FUND ADVISER, L.L.C., f/k/a BLACK DIAMOND CAPITAL MANAGMENT, L.L.C., BALCK DIAMOND CAPITAL HOLDINGS, L.L.C., STEPHEN H. DECKOFF, SD INVESTMENTS, L.L.C., and BDCM OPPORTUNITY FUND, G.P., L.L.C.,

Counterclaim Defendants.

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(s): _____

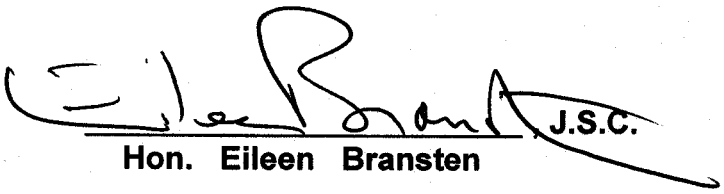
The following papers, numbered 1 to 3, were read on this motion for summary judgment.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

Dated: November 15, 2012



J.S.C.
Hon. Eileen Bransten

Check One: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMITORDER/JUDG.

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EILEEN BRANSTEN, J.:

Defendants/counterclaim-plaintiffs James J. Zenni ("Zenni"), Jr., Zenni Holdings, L.L.C., Z Capital Partners, L.L.C., Z Capital Special Situations Fund, L.P., and Z Capital Special Situations Fund-A, L.P. (collectively "defendants") move, pursuant to CPLR 3212, for partial summary judgment on Count II of the second amended counterclaim, which seeks payment of the Carried Interest[1] allegedly due Zenni under the parties' Membership Interest Redemption Agreement ("MIRA").

BACKGROUND

This lawsuit arises out of a contentious dispute between two former business associates who are now principals of competing asset management firms. In 1995, Zenni and plaintiff Stephen H. Deckoff ("Deckoff") co-founded Black Diamond Capital Management, L.L.C., an alternative asset management firm. In 2006, Zenni and Deckoff decided to part ways. Since the parties anticipated that Zenni would establish a competing asset management fund, and that they would vie for the same clients, they entered into a MIRA. This MIRA contained provisions relating to competition and

[1] "Carried Interest" is the share of the profits a capital management firm receives as compensation for managing the fund.

confidentiality, and in which plaintiffs/counterclaim-defendants (plaintiffs/counterclaim-defendants are collectively referred to as plaintiffs or Black Diamond) agreed to pay Zenni, among other things, a percentage of Black Diamond's Carried Interest in a fund known as Opportunity Fund I (Affirmation of Matthew Kane ("Kane Affirm."), Ex. A, § 12(c)).

Plaintiffs commenced this action in 2008 alleging breach of several of the confidentiality and competition provisions of the MIRA. Several months after plaintiffs commenced this action, Zenni contacted plaintiffs to inquire about the status of his share of Carried Interest from the sale of one of the Opportunity Fund I investments–including, Bayou Steel. BDCM contended that Zenni was not entitled to the Carried Interest because he was in material breach of the MIRA. BDCM also took issue with Zenni's claim that he was owed $11 million in Carried Interest, contending that Zenni's share, if any, amounted to $8.3 million.

As a result of the dispute, Zenni amended his counterclaims to allege that BDCM breached the MIRA by failing to pay Zenni his Carried Interest and by failing to give him access to books and records he needed to verify the amount due.[2]

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[2]In the event of a dispute regarding the amount of interest due, Section 12(i) of the MIRA permits Zenni to review BDCM's books and records to verify the amount due.

Thereafter, in 2009, Zenni moved for partial summary judgment on his second and fourth counterclaims for Carried Interest and his right to review the books and records.

In an August 20, 2009 decision, this court denied summary judgment, holding that there were questions of fact about "whether Zenni, in fact, breached the MIRA and, if he did, whether that breach was material. The determination of Zenni's recovery of the 'Carried Interest' for Bayou Steel is inextricably intertwined with the question of his culpability for breach of the MIRA and it cannot be determined before trial of the main claim." (Affirmation of Seth R. Goldman ("Goldman Affirm."), Ex. B) (8/20/09 decision on motion sequence number 004).

Following discovery, in March 2011, plaintiffs moved to amend the 2008 complaint to include, inter alia, allegations of defamation which allegedly occurred after the 2008 complaint was filed. Pursuant to a decision and order dated June 20, 2011, this court denied plaintiff's motion to amend (Goldman Affirm., Ex. C). Thereafter, in June 2011 defendants moved for summary judgment dismissing the 2008 complaint, which motion was granted on April 30, 2012. (Goldman Affirm., Ex. F). In that same decision, this court granted defendants' motion requesting permission to file a second summary judgment motion seeking payment of the Carried Interest allegedly due under the MIRA.

However, on July 1, 2011, prior to the court's decision on defendants' summary judgment motion, plaintiffs filed a summons with notice to commence a new action (the "2011 Action") against all of the defendants in the 2008 action and, in October 2011, BDCM filed a complaint in the 2011 Action which asserted causes of action for defamation, breach of the MIRA's non-disparagement clause, tortious interference with prospective business relations and unfair competition based on defendants' alleged post-2008 conduct. Defendants moved to dismiss the complaint, which motion was granted in part, and denied in part. Importantly, a portion of the cause of action alleging breach of the nondisparagement clause in the MIRA survived dismissal, as did a portion of the unfair competition claim (Goldman Affirm., Ex F).

Defendants' Motion for Summary Judgment

Defendants bring the instant motion for summary judgment on count two of its Second Amended Answer and Counterclaims for breach of contract for failure to make carried interest distributions.

Section 12(c) of the MIRA outlines three scenarios, relevant to this motion, under which Zenni's Carried Interest in each Opportunity Fund I investment is deemed vested and payable:

Carried Interest After December 31, 2006. For all periods commencing on or after January 1, 2007, [Black Diamond] shall continue to make distributions to [Zenni] in respect of [Zenni's] Carried Interest within 30 days after the Opportunity Fund I GP becomes entitled to receive distributions, or otherwise has the right to cause distributions to be made from Opportunity Fund I in respect of its Carried Interest, subject to the following vesting schedule:

(i) 20% of [Black Diamond's] Carried Interest in each investment by Opportunity Fund I . . . shall be deemed vested if Zenni is or was an employee of the Company at the time the capital commitments for Opportunity Find I were raised by the company [Tranche 1];

(ii) An additional 20% of [Black Diamond's] Carried Interest in each Opportunity Fund I investment shall be deemed vested if Zenni was an employee of the Company at the time such Opportunity Fund I investment was made, based on the amounts actually invested by Opportunity Fund I during the period in which Zenni is or was an employee of the Company [Tranche 2];

(iii) An additional 40% of [Black Diamond's] Carried Interest in each Opportunity Fund I investment shall be deemed vested if Zenni is or was an employee of the Company throughout the entire period during which the Company managed the applicable Opportunity Fund I Investment (the Management Period) based on the amounts actually invested by Opportunity Fund I during the period in which Zenni is or was an employee of the Company, with such percentage to be prorated for each such . . . investment based of the portion of the Management period for such investment during which Zenni is or was an employee of the Company [Tranche 3]

(Kane Affirm., Ex. A).

Section 12(d) of the MIRA explains that a document attached to the MIRA as Exhibit L is a list of Opportunity Fund I investments, updated as of the closing, for which Zenni is entitled to receive Carried Interest, "with the date and amount of the investment set forth thereon and the date such Opportunity Fund I Investment was sold, if applicable."

Contentions

In support of the motion for summary judgment on the counterclaim for Carried Interest, defendants argue that the MIRA is clear and unequivocal regarding plaintiffs' obligation to pay Carried Interest and that plaintiffs have breached the MIRA by failing to pay Zenni his share of the Carried Interest. Moreover, they contend that there is no genuine issue of material fact regarding the amount of Carried Interest due Zenni under the MIRA because, pursuant to Section 12 of the MIRA and Exhibit L, the amount owed to Zenni is a sum certain that can be determined by calculating three variables: (1) the amount of Carried Interest earned by BDCM; (2) the date each investment was made; and (3) the date the investment was sold.

Defendants also seek prejudgment interest from the day that each payment of Carried Interest was due.

In opposition to summary judgment, plaintiffs contend that there are genuine issues of material fact about the amount of Carried Interest, if any, owed to Zenni because plaintiffs take the position that Zenni's share of Tranche 3 must be determined from the date of each separate investment in a given company, not just from the initial investment date. For example, plaintiffs made several separate investments in Bayou Steel and, under plaintiffs' theory, when a series of investments are made into a portfolio company, a separate management period is triggered for each investment in that company. It is plaintiffs' position that Zenni's Carried Interest must be calculated for each management period, not just from the initial investment date.

They also argue that summary judgment may not be granted on the counterclaim because this court's ruling, in Zenni's first summary judgment motion, that the issue of whether defendants breached provisions of the MIRA is "inextricably intertwined" with defendants' entitlement to carried interest, is law of the case and still relevant because plaintiffs' breach of MIRA claims are extant in the 2011 action.

In addition, plaintiffs argue that, pursuant to Section 11(e) of the MIRA, Zenni's claims for Carried Interest should be resolved through arbitration. They also contend that

Zenni should not be permitted to pursue counterclaims for Carried Interest related to investments that were realized after the date defendants filed their second amended answer and counterclaims and that, if Zenni does recover Carried Interest, plaintiffs should be reimbursed for state and federal income taxes they paid with respect to all the Carried Interest payments received through December 31, 2011 and that Zenni's Carried Interest payment, if any, should be reduced by the amount of Connecticut state income tax that Zenni failed to pay on 2007 income because the amount of that unpaid tax has been assessed against Black Diamond.[3]

DISCUSSION

Summary judgment will be granted if it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980); *Friends of Animals v.*

[3] At the oral argument of this motion on June 28, 2012, defendants stated that they accept plaintiffs' calculation of the amounts of Carried Interest due to Zenni under Sections 12(c)(i) and (ii) (Tranches 1 and 2) of the MIRA (6/28/12 Tr. at 7-10). Accordingly, the Court ordered plaintiffs to pay Zenni the amount of Carried Interest due to Zenni under Tranche 1 by July 6, 2012 (6/28/12 Tr. at 41, 52-53) and permitted the parties to reserve their objections as to all the other issues.

Associated Fur Mfrs., 46 N.Y.2d 1065, 1067 (1979). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact. *Alvarez v Prospect Hosp.*, 68 N.Y.2d at 324; *Zuckerman,* 49 N.Y.2d at 562. Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 N.Y.2d at 562; *see also Ellen v. Lauer,* 210 A.D.2d 87, 90 (1st Dept 1994) (it "is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . . [citations omitted]").

A. Law of the Case

Plaintiffs' contention that law of the case bars consideration of this motion is without merit. In *People v. Evans,* the Court of Appeals stated, "law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a *single* litigation *before final judgment*." 94 N.Y.2d 499, 502 (2000).

Here, the court has dismissed the complaint in this action on the merits. Accordingly, all questions of fact regarding defendants breach of the MIRA have been

resolved in defendants' favor and thus the counterclaim is ripe for review. The 2011 action is a different action from this case and, thus, the law of the case doctrine does not apply to bar the court's consideration of this second motion for summary judgment on the Carried Interest counterclaim. *See Williamson v. Stallone*, 28 Misc 3d 738, *746 (Sup. Ct. N.Y. Cty. 2010) (stating that law of the case doctrine does not apply because the several cases to which the trustee referred are separate cases); *see also* Goldman Affirm., Ex. F, April 30, 2012 decision at 23 ("the question of fact cited in the court's 2009 decision . . . has been resolved . . .").

B. Arbitration

After four years of litigation, including discovery, filing of a note of issue and a final judgment on the allegations in the complaint, plaintiffs have waived their right to enforce the arbitration clause. As the Court of Appeals stated in *Flores v. Lower E. Side Serv. Ctr., Inc.*, "[a]ssuming the provision applied to this type of dispute, [litigant] did not timely assert an arbitration claim either by raising it as a defense in its answer or by moving to compel arbitration (*see* CPLR 7503), electing instead to fully participate in this litigation for more than 16 months through discovery and the filing of a note of issue. These acts were clearly inconsistent with [its] later claim that the parties were obligated to

settle their differences by arbitration." 4 N.Y.3d 363, 371-372 (2005) (internal quotation marks and citations omitted); *see also Nishio v. Hutton & Co.,* 168 A.D.2d 224, 224 (1st Dep't 1990).

C. Post-Counterclaim Damages

Plaintiffs' argument that Zenni should not be permitted to assert claims for Carried Interest realized after the counterclaim was filed is without merit. CPLR 3025(c) permits "pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just . . . ." Moreover, it is settled that, in the absence of prejudice or surprise, a court may amend a pleading, sua sponte, to conform to the evidence. *See Matter of Denton*, 6 A.D.3d 531, 532-533 (2d Dep't 2004); *Cave v. Kollar*, 2 A.D.3d 386, 388 (2d Dep't 2003). Here, plaintiffs do not claim that they would be prejudiced or surprised by a sua sponte amendment of the pleading to permit defendants to claim Carried Interest that was realized after the counterclaim was filed. Rather, they state that there are questions of fact about what investments should be included in the calculation of interest. Such questions will not prohibit amendment where, as here, the adverse party has notice or knowledge of the additional damage claim. *See River Val. Assoc. v. Consol. Rail Corp.*, 182 AD2d 974, 976 (3d Dep't 1992) (a court may conform the pleading to the

proof where it is apparent from the record that the adverse party had been on notice during discovery that the plaintiff would be pursuing a particular matter even though it wasn't alleged in the pleading). Here, the parties' submissions reveal that the plaintiffs have been on notice throughout this litigation that Zenni was seeking Carried Interest that was allegedly earned after the counterclaim was filed. Accordingly, the court, sua sponte, permits the counterclaim to be amended to assert claims for Carried Interest that was earned after the counterclaim was filed.

D. Carried Interest

Defendants have made a prima facie showing that, pursuant to the MIRA, Zenni is entitled Carried Interest under Section 12(c) and Exhibit L.

a. As to Tranche 1, at oral argument, plaintiffs agreed to pay Zenni $5,771,982.22 for Carried Interest due under Tranche 1 (6/28/12 Tr. at 40).

b. As to Tranche 2, the court finds that: 1) there is no legal impediment to the court's consideration of this motion for summary judgment; 2) plaintiffs have determined that $5,743, 655.39 is the amount of Carried Interest due under Tranche 2; and 3) at oral argument, Zenni accepted plaintiffs' calculation as to the amount of Carried Interest due Zenni under Tranche 2 (6/28/12 Tr. at 9-10), accordingly the branch of the motion that

seeks summary judgment in the amount of $5,743.655.39 for Carried Interest due on Tranche 2 is granted.

c. As to Tranche 3, in *W.W.W. Assocs., Inc. v. Giancontieri*, the Court of Appeals stated the familiar proposition that "when the parties set down their agreement in a clear, complete document, their writing should, as a rule, be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." 77 N.Y.2d 157, 162 (1990); *see also Bank of Am. Sec., LLC v. Solow Bldg. Co. II, L.L.C.*, 47 A.D.3d 239, 243 (1st Dep't 2007]).[4]

Here, the MIRA provides the formula necessary to calculate the amount of carried interest owed under Tranche 3. That is, under Section 12(c)(iii), the remaining 40% of Zenni's carried interest vests at a rate equal to 40% of the ratio of the total number of days Zenni was a BDCM employee while the realized investment was managed by Opportunity Fund I divided by the total number of days between the investment date and the date the investment was sold (the Management Period).

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[4] Delaware law is not to the contrary. In *Anglo Am. Sec. Fund., L.P. v. S.R. Global Intl. Fund*, the court stated, "[i]n discerning the obligations imposed by a contract at the summary judgment stage, a court should initially focus solely on the language of the contract itself. If that language in unambiguous, its plain meaning alone dictates the outcome." 2006 WL 1494360, at *2 (Del. Ch. 2006).

There is no dispute that plaintiffs have earned a total of $65,386,268.30 in Carried Interest on the Opportunity Fund I investments. Using the investment date for each of the portfolio companies set forth in Exhibit L of the MIRA and the realization dates provided by plaintiffs, defendants have calculated Zenni's share of carried interest for Tranche 3 as $5,963,555.22.

Plaintiffs claim that there are material issues of fact because about the amount owed under Tranche 3 because: 1) according to prior practice, the investment date listed in Exhibit L to the MIRA should not be used as the investment dates for each of the portfolio companies; and 2) the management period does not necessarily end when Opportunity Fund I sells its position in each investment. However, plaintiffs' interpretations of the contractual provisions and reliance on prior practice are contrary to the express language of the MIRA and, accordingly, their objections are without merit. *See Bethlehem Steel Co. v. Turner Const. Co.*, 2 N.Y.2d 456, 460 (1957) ("when a contract is clear in and of itself, circumstances extrinsic to the document may not be considered . . .") (internal citation omitted); *Sterling Natl. Bank v. Fashion Assoc.*, 17 Misc 3d 1133(A) (Sup. Ct. N.Y. Cty. 2007), *affd* 69 A.D.3d 541 (1st Dept 2010). "Clear language [in a contract] does not become ambiguous just because the parties argue differing interpretations. The court must interpret the contract, giving effect to the

parties' expressed intentions in entering into the agreement, and adopting an interpretation which gives effect to all of its provisions." *Wilhelmina Artist Mgt., LLC v. Knowles*, 8 Misc.3d 1012(A), at *6 (Sup. Ct. N.Y. Cty 2005) (internal quotation marks and citations omitted). Indeed, a "court should construe the agreements so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless." *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007) (internal quotations marks and citations omitted).

There is no language in the MIRA to support plaintiffs' assertion that the parties must give separate consideration to the date of each of the company's separate cash investments in Bayou Steel (or any other Opportunity Fund I investment) which would result in create several different Management Periods under Section 12 (c) (iii) for the purpose of calculating Carried Interest. Indeed, Exhibit L lists only one amount, $41,499,998, which is the total of all these separate investments, as the investment amount, even though it is undisputed that each of these individual investments in Bayou Steel was made prior to the close of the MIRA[5] and the information regarding these separate investments was available to the parties at the time the MIRA was being negotiated.

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[5] The last investment in Bayou Steel was made in May 2006.

In further support of Zenni's calculation of Carried Interest, Section 12 (c) (iii) defines the Management Period as "the entire period during which the Company managed the applicable Opportunity Fund I investment." Thus, based on the unambiguous language of the contract, the parties envisaged that one Management Period, covering the entire period during which the company managed the investment, would be used to calculate the Carried Interest due to Zenni.

Moreover, plaintiffs' argument that prior conduct regarding other investments suggests that each infusion of money into an Opportunity Fund I company should be tracked as a separate investment for the purpose of prorating the management period is unavailing. Section 37(g) of the MIRA states that no course of dealing or delay in exercising a right under the agreement will "operate as a waiver thereof or otherwise prejudice such party's rights, powers and remedies conferred by this Agreement . . . ". Accordingly, even if Zenni had, in earlier dealings with plaintiffs, agreed to a different course of conduct, the express language of the MIRA prohibits plaintiffs from relying on such earlier course of dealings to vary the terms of the MIRA.

In addition, plaintiffs' assertion that it uses multiple start dates for different investments to track the limited partners' returns is irrelevant. The manner in which the limited partners are paid is governed by the Partnership Agreement (Kane Affirm., Ex.

C). Zenni is not a limited partner in Opportunity Fund I. He is the "seller" of his share of the business and the manner in which he is paid is governed by the MIRA.

Plaintiffs' conclusory contention that there are questions of fact as to whether the management period has ended for Bayou Steel because it is not a fully realized investment for the purpose of calculating Carried Interest is unavailing because it is belied by the documentary evidence that establishes that the Bayou Steel investment has been fully realized since August 2008 (Kane Affirm., Ex. N at BD21246). In an August 14, 2008 letter to investors, plaintiffs announced, "We are pleased to inform you that, on August 15, 2008, BDCM Opportunity fund, L.P. will be distributing the proceeds from the final sale of the investment in Bayou Steel, consummated on July 31, 2008." *Id.* The letter mentions an escrow of additional proceeds that will be distributed at a later date, but it never states that plaintiffs are still managing Bayou Steel. On May 20, 2009, plaintiffs sent another letter to investors announcing that they would be distributing the escrowed proceeds referred to in the July 31 letter (Kane Aff., Ex. N at BD21249). In addition, plaintiffs' Quarterly Investor Report for the period ending September 30, 2008 included Bayou Steel in the Schedule of Realized Investments (Kane Aff., Ex. D at BD21211). Finally, in a September 2009 presentation to potential investors in plaintiffs' Opportunity

Fund III, plaintiffs refer to Bayou Steel as a realized investment (Kane Aff., Ex. G at BD020807, BD020810).

E. Taxes

1. Plaintiffs' request for reimbursement for Connecticut state income tax it allegedly paid on Zenni's behalf, has been raised for the first time in plaintiffs' opposition to this motion. It is unrelated to the matters at issue in this litigation and will not be considered here.

2. Plaintiffs' request for reimbursement for income taxes it paid on Zenni's share of the carried interest is equally unavailing. It was plaintiffs' decision to pay this disputed money to themselves as income rather than treating it as a contingent liability or, as provided in Section 36(a) of the MIRA, as payments under "Section 736(a)(1) of the [U.S. Tax] Code."

Moreover, they have failed to submit evidence, in admissible form, that demonstrates that they have indeed paid the taxes they are claiming as an offset.

F. Conclusion

Zenni has established his prima facie case by demonstrating that, based on the MIRA and the documentary evidence, he is entitled to summary judgment, on Tranche 3, in the amount of $5,963,555.22. Plaintiffs have failed to come forward with documentary evidence sufficient raise a factual issue requiring trial, and accordingly, it is

ORDERED, that defendant /counterclaim plaintiff James J. Zenni, Jr., Zenni Holdings, L.L.C., Z Capital Partners, L.L.C., Z Capital Special Situations Fund, L.P., and Z Capital Special Situations Fund-A, L.P.'s motion for summary judgment on Count II of its second amended counterclaim is granted in its entirety; and it is further

ORDERED that the branch of defendant/counterclaim plaintiffs motion seeking prejudgment interest is granted.[6]

Settle Order as to the amounts of damages and interest due and owing.

Dated: New York, New York
November 15, 2012

ENTER:

Hon. Eileen Bransten, J.S.C.

[6]See, CPLR 5001(a).