SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

GAMA AVIATION INC. and
GAMA LEASING LIMITED,

Plaintiffs,

-against-

SANDTON CAPITAL PARTNERS, LP,
SANDTON CAPITAL PARTNERS, LLC
SANDTON PARTNERS, LLC AND
KB ACQUISITION, LLC,

Defendants.

KB ACQUISITION, LLC,

Counterclaim Plaintiff,

-against-

GAMA AVIATION INC. and
GAMA LEASING LIMITED,

Counterclaim Defendants,

-and-

GAMA HOLDINGS LIMITED,

Additional Counterclaim Defendant.

Index No.: 651710/10
Motion Seq. No. 016
Motion Date: 7/23/13

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

This motion is decided in accordance with the accompanying memorandum decision.

Dated: October 21, 2013 , J.S.C.
Hon. Eileen Bransten

1. CHECK ONE: .....☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: ☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .....☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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GAMA AVIATION INC. and GAMA LEASING LIMITED,

Plaintiffs,

-against-

Index No. 651710/10
Motion Date: 7/23/13 and 9/3/13
Motion Seq. No.: 016, 020, 021, 022, 023 and 024

SANDTON CAPITAL PARTNERS, LP, SANDTON CAPITAL PARTNERS, LLC, SANDTON PARTNERS, LLC and KB ACQUISITION, LLC,

Defendants.

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KB ACQUISITION, LLC,

Counterclaim Plaintiff,

-against-

GAMA AVIATION INC. and GAMA LEASING LIMITED,

Counterclaim Defendant,

-and-

GAMA HOLDINGS, LIMITED,

Additional Counterclaim Defendant.

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BRANSTEN, J.:

Motion Sequence Nos. 016, 020, 021, 022, 023, and 024 are consolidated for disposition.

I. Introduction

The underlying facts and procedural history of this action have been fully set forth in prior decisions of this court, and will not be repeated here, unless necessary for disposition of the instant motions.

In this action, plaintiffs Gama Aviation Inc. ("Gama Aviation") and Gama Leasing Limited ("Gama Leasing") (collectively, "Gama") seek the reformation of an alleged scrivener's error in the maturity date of certain loan documents (the "Loan Documents"), dated August 20, 2008, as between nonparty Key Equipment Finance Inc. ("KEF") and plaintiffs. Plaintiffs claim that the Promissory Note Aircraft Loan (the "Note") they executed in August 2008 in favor of KEF contained an incorrect maturity term of 24 months, even though such term is plainly stated on the face of the Note. Plaintiffs contend that the Note, which they allegedly failed to read before signing, was supposed to reflect a term of 60 months, and that it is the product of mutual mistake. Defendants Sandton Capital Partners, LP, Sandton Capital Partners, LLC, Sandton Partners LLC and KB Acquisition, LLC ("KB") (collectively, "Sandton") later acquired a portfolio of loans from KEF that included the loan to Plaintiffs. Plaintiffs allege that KEF fully disclosed the facts and circumstances surrounding the Gama loan to defendants, but that defendants dissuaded KEF from reforming the Loan Documents, and later declared the loan to be in default.

In October 2010, plaintiffs commenced this action, asserting claims against defendants for (1) reformation of the Loan Documents based upon the mutual mistake of plaintiffs and KEF with respect to the maturity date; (2) a declaratory judgment regarding the parties' respective rights with respect to the Loan Documents and the aircraft (the "Aircraft"); and (3) tortious interference with plaintiffs' loan agreement with KEF, the original lender. Plaintiffs also seek preliminary and permanent injunctive relief barring defendants from interfering with plaintiffs' use of the Aircraft, which serves as collateral for the loan.

Since plaintiffs filed this lawsuit, the parties have conducted extensive discovery both as to each other and nonparty KEF. In October 2011, the parties filed competing motions to compel discovery, which were briefed, argued and appealed to decision. Defendants have produced more than 1500 pages of documents, plaintiffs more than 1600, and KEF more than 2000. The parties have deposed each other's principals over four days and have deposed two KEF witnesses over three days.

A. *The Instant Motions*

In Motion Sequence No. 016, defendants move for an award granting them summary judgment dismissing the complaint in its entirety. Defendants also move for an

order granting summary judgment to counterclaim plaintiff KB on its first through fourth and seventh through ninth counterclaims.

In Motion Sequence No. 020, plaintiffs move for leave to file a first amended complaint.

In Motion Sequence No. 021, plaintiffs move, pursuant to CPLR 3124, for an order compelling KEF to comply with the subpoena duces tecum dated April 25, 2011 and the subpoena ad testificandum dated May 30, 2012. KEF cross-moves for a protective order restricting the subpoenas to documents that KEF previously promised to produce.

In Motion Sequence No. 022, plaintiffs move for an order compelling defendants to produce documents responsive to plaintiffs' first and second notices of discovery and inspection.

In Motion Sequence No. 023, plaintiffs move to compel accurate and complete responses to their second set of interrogatories.

In Motion Sequence No. 024, plaintiffs move for leave to file a first amended and supplemental reply to defendants' counterclaims.

For the reasons set forth below, plaintiffs' motions to amend the complaint and their reply to defendants' counterclaims are granted, and defendants' motion for summary judgment is denied as moot. Plaintiffs' motion to compel KEF to produce documents,

and to compel defendants to produce documents responsive to the first and second document requests is denied. Plaintiffs' motion to compel responses to the second set of interrogatories is granted in part, and denied in part.

II. Discussion

A. *Plaintiffs' Motion for Leave to Amend (Motion Sequence No. 016)*

CPLR 3025(b) provides that a party may amend or supplement its pleading "by setting forth additional or subsequent transactions or occurrences, at any time by leave of court..." Leave to amend is "freely given" under CPLR 3025(b), "'provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit.'" *Clark v. Clark*, 93 A.D.3d 812, 816 (2d Dep't 2012) (citation omitted); *see also Miller v. Cohen*, 93 A.D.3d 424, 425 (1st Dep't 2012) (stating that on a motion to amend a complaint, plaintiff "need not establish the merit of the proposed new allegations, but must 'simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit'") (citation omitted); *Loewentheil v. White Knight, Ltd.*, 71 A.D.3d 581, 581 (1st Dep't 2010) ("Leave to amend pleadings ... should be liberally granted"). Indeed, "[t]he party opposing the motion to amend must overcome a heavy presumption of validity in favor of the moving party." *Otis Elevator Co. v. 1166 Ave. of Am. Condo.*, 166 A.D.2d 307, 307 (1st Dep't 1990).

"'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine.'" *Edenwald Constr. Co. v. City of N.Y.*, 60 N.Y.2d 957, 959 (1983) (citation omitted); *accord Bishop v. Maurer*, 83 A.D.3d 483, 484 (1st Dep't 2011).

The proposed amended complaint contains six additional causes of action against defendants based upon or arising out of the same acts, transactions and occurrences alleged in the original complaint, as well as actions allegedly taken by defendants to harm plaintiffs since the filing of the original complaint. The additional causes of action include: breach of a 2008 refinancing agreement between plaintiffs and KEF, promissory estoppel, breach of the Loan Documents, tortious interference with prospective economic relations, conversion, and wrongful repossession of the Aircraft.

Plaintiffs' motion to amend the complaint is granted, as plaintiffs have demonstrated that the claims in the proposed amended complaint are neither devoid of merit nor palpably insufficient.

1. **Breach of the 2008 Refinancing Agreement (Proposed Second Cause of Action)**

The proposed second cause of action is for breach of the 2008 Refinancing Agreement. In the proposed amended complaint, plaintiffs allege that, in August 2008, KEF agreed – both before the loan closed, and again in writing after the loan closed –

that it would search the market for an alternative long-term financing solution more favorable to plaintiffs after the loan was funded. Plaintiffs further allege that once alternate financing was found, KEF agreed that it would assist plaintiffs by placing the loan with that more favorable lending source (the "2008 Refinancing Agreement").

Plaintiffs allege that, regardless of whether the loan for the Aircraft contained a five-year or two-year maturity date, plaintiffs would not have agreed to this loan, with its unusually high fixed interest rate over the first 24 months, if not for KEF's express promise to locate a more favorable financing source for plaintiffs once the loan had closed. Plaintiffs further contend that they fully performed their contractual obligations, but that KEF breached the 2008 Refinancing Agreement when it: (1) failed to perform as promised, (2) failed to conclude its refinancing negotiations with plaintiffs in 2010, and (3) sold the Loan Documents to defendants, whom KEF knew would not perform this contractual obligation. Plaintiffs also maintain that they incurred damages as a result of this breach, including payment of an excessive rate of interest for the first 24 months of the loan, lost profits from the inability to operate the Aircraft, and devaluation of the Aircraft.

The cause of action as pleaded is not patently devoid of merit, since it alleges each of the required elements for a cause of action for breach of contract: (1) a valid contract; (2) the plaintiff's performance; (3) a breach by the defendant; and (4) damages. *Morris v.*

702 E. Fifth St. HDFC, 46 A.D.3d 478, 479 (1st Dep't 2007); *Noise In The Attic Prod., Inc. v. London Records*, 10 A.D.3d 303, 306 (1st Dep't 2004). In addition, defendants, as assignees of the Loan Documents, acquired no greater rights than KEF, and are subject to all claims, counterclaims and defenses that plaintiffs could have asserted against KEF. *TPZ Corp. v. Dabbs*, 25 A.D.3d 787, 789 (2d Dep't 2006) ("'an assignee never stands in any better position than his assignor' ... and takes an assignment subject to any preexisting liabilities") (quoting *Matter of International Ribbons Mills (Arjan Ribbons)*, 36 N.Y.2d 121, 126 (1975)). Therefore, taking the facts as pleaded for the purpose of this motion, defendants are potentially liable to plaintiffs for their alleged breach of the 2008 Refinancing Agreement.

2. **Promissory Estoppel (Proposed Third Cause of Action)**

"'To establish a promissory estoppel it must be shown that the defendant made a clear and unambiguous promise upon which the plaintiff reasonably relied to his or her detriment.'" *Clifford R. Gray, Inc. v. LeChase Constr. Serv., LLC*, 51 A.D.3d 1169, 1170 (3d Dep't 2008) (citation omitted); *accord Williams v. Eason*, 49 A.D.3d 866, 868 (2d Dep't 2008). A cause of action for promissory estoppel will lie even where the promise relied upon is too indefinite to support a claim for specific performance or benefit-of-the-bargain damages. *Clifford R. Gray, Inc.*, 51 A.D.3d at 1171.

With respect to their proposed promissory estoppel claim, plaintiffs allege that KEF made a clear and unambiguous promise to plaintiffs that, after the loan was funded, it would search the market for alternative, long-term financing more favorable to plaintiffs, and once found, assist plaintiffs by placing the loan with that alternative financing. In addition, plaintiffs allegedly relied on this promise by agreeing to accept the unfavorable loan terms then being offered by KEF, including the abnormally high interest rate for the first 24 months. Moreover, Plaintiffs assert that their reliance as to their detriment and was reasonable, both because the bank put this promise in writing before and after the loan closed, and because of plaintiffs' long-term professional relationship with the bank.

Based on the allegations as pleaded in the proposed amended complaint, the proposed third cause of action is not palpably insufficient, as plaintiffs have sufficiently alleged the elements of a promissory estoppel claim, and defendants, as assignees of KEF, are potentially liable for KEF's breach of promise.

3. **Breach of the Loan Documents (Proposed Fourth Cause of Action)**

Plaintiffs' proposed fourth cause of action is for breach of the Loan Documents. Plaintiffs allege that defendants have breached the Loan Documents by refusing to accept a September 2010 monthly payment, wrongfully declaring plaintiffs in default, and by

grounding and attempting to foreclose on and repossess the Aircraft. Plaintiffs also allege that KEF's conduct in 2010 was in breach of the implied covenant of good faith and fair dealing, and deprived plaintiffs of the long-term financing and cooperation for which they had bargained.

This claim as pleaded is not palpably insufficient. If plaintiffs are successful on their reformation claim, and establish that the parties' true agreement was for a loan with a 60-month maturity, plaintiffs may be able to establish that KEF, and defendants, as its assignees, wrongfully refused to accept plaintiffs's continued monthly payments in September 2010, and wrongfully declared plaintiffs in default.

4. **Intentional Interference With Contract (Proposed Fifth Cause of Action)**

Plaintiffs' proposed fifth cause of action for intentional interference with contractual relations mirrors plaintiffs' second cause of action in their original complaint. *Compare* Compl. ¶¶ 77-86 *with* Proposed Am. Compl. ¶¶ 194-302. Plaintiffs assert that only minor modifications have been made to the allegations in this count to clarify the contract in dispute, i.e. the contract purportedly interfered with by defendants.

To state a claim for intentional interference with contractual relations, a plaintiff must allege: "1) the existence of a contract, enforceable by the plaintiff, 2) the defendant's knowledge of the existence of that contract, 3) the intentional procurement by

the defendant of the breach of the contract, and 4) resultant damages to the plaintiff." *Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 111 (1st Dep't 2002).

Plaintiffs allege that defendants were aware of, intentionally interfered with, and caused KEF to breach its agreements with them to finance the acquisition of the Aircraft, for a term not to exceed 60 months, paying a fixed rate for the first 24 months on the loan. Likewise, plaintiffs allege that defendants intentionally interfered with an agreement by KEF to search the market post-funding to locate alternative long-term financing more favorable to plaintiffs, and to place the loan with such alternative financing, and that plaintiffs sustained damages as the proximate result of defendants' conduct. These allegations sufficiently state a claim for intentional interference with contractual relations and, as such, this cause of action is not palpably insufficient.

5. **Tortious Interference With Prospective Relations (Proposed Sixth Cause of Action)**

Plaintiffs' proposed sixth cause of action is for tortious interference with prospective economic relations. To prevail on a claim for tortious interference with prospective economic advantage under New York law, a plaintiff must show that (1) he had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted with the sole purpose of harming the plaintiff or used

dishonest, unfair or improper means; and (4) the defendant's acts injured the relationship. *Biosafe-One, Inc. v. Hawks*, 639 F. Supp. 2d 358, 366 (S.D.N.Y. 2009), *aff'd* 379 Fed. App'x 4 (2d Cir. 2010); *71 Pierrepont Assoc. v .71 Pierrepont Corp.*, 243 A.D.2d 625, 625-626 (2d Dep't 1997); *Rad Adver., Inc. v. United Footwear Org.*, 154 A.D.2d 309, 310 (1st Dep't 1989). The essential element of this claim is that the complaining party would have obtained the economic advantage but for the defendant's interference. *Id.*

Here, plaintiffs have pleaded the elements of a tortious interference claim. Plaintiffs allege that defendants were aware of plaintiffs' relationship with KEF and that, prior to acquiring the Loan Documents, defendants were aware that plaintiffs and KEF were in discussions concerning the mistake in the Loan Documents. In addition, plaintiffs contend that defendants were aware that plaintiffs and KEF were negotiating to refinance the loan and execute new loan documents. Plaintiffs further allege that, despite such knowledge and awareness, defendants acquired the Loan Documents in bad faith, at a steep discount, and after the maturity date stated in the Note, for the sole purpose of exploiting the erroneously documented loan terms to plaintiffs' detriment.

Plaintiffs also contend that defendants' conduct in acquiring the Loan Documents under such bad-faith circumstances is illegal, and in violation of New York UCC § 1-203, which imposes an obligation of good faith in the performance of all contract and duties

governed by the Act, and UCC § 3-307(7), which addresses the bad-faith acquisition of a negotiable instrument.

Under UCC § 3-307(7), a party acquires a note improperly, and in bad faith, where it has knowledge of a claim or defense to its enforcement, or "knowledge of such facts that his action in taking the instrument amounts to bad faith." Under New York law, a party acquiring a note acts in bad faith when it fails to make inquiry "as part of a deliberate desire on its part to evade knowledge because of a belief or fear that investigation would disclose a defense arising from the transaction." *Joint Venture Asset Acquisition v. Zellner*, 808 F. Supp. 289, 299 (S.D.N.Y. 1992).

Here, plaintiffs allege that defendants' conduct in acquiring the Loan Documents, as set forth above, was in violation of their express statutory duties under UCC § 1-203 to exercise good faith in the performance of all contracts and all duties governed by the act. Plaintiffs allege additional wrongful conduct by virtue of defendants' agreement with KEF to conceal KEF's true obligations to plaintiffs, including its five-year financing and 2008 refinancing obligations, and to cooperate in enforcing the erroneous note, and the concealment of evidence from plaintiffs in connection with the litigation. As pleaded, this cause of action is not palpably insufficient, as these allegations suffice to state a claim for interference with prospective economic relations.

6. Conversion of the Aircraft (Proposed Seventh Cause of Action)

The proposed seventh cause of action is for conversion of the Aircraft. Plaintiffs allege that defendants' wrongful declaration of an event of default and retention of Nicholas Cerretani of Cerretani Aviation Group, LLC, as their agent with power of attorney to repossess the Aircraft, constituted the exercise of dominion over the Aircraft or interference in derogation of plaintiffs' rights.

This court finds that the proposed seventh cause of action is not palpably insufficient, as these facts, if true, might potentially constitute conversion of the Aircraft. "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." *Colavito v. N.Y. Organ Donor Network, Inc.*, 8 N.Y.3d 43, 50 (2006) (internal citation omitted).

7. Wrongful Repossession of the Aircraft (Proposed Eighth Cause of Action)

The proposed eighth cause of action is for wrongful repossession of the Aircraft. Plaintiffs allege that defendants' actions in wrongfully declaring an event of default and grounding the Aircraft constituted constructive repossession of the Aircraft, resulting in the Aircraft's devaluation. These facts, if true, may give rise to a claim for wrongful repossession and devaluation of collateral, as a secured party may repossess collateral or

render the collateral unusable only after an event of default. *See* N.Y. U.C.C. Law § 9-609. Moreover, "a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. *See* N.Y. U.C.C. § 9-207(a). Accordingly, this cause of action does not lack merit.

8. **Miscellaneous Changes/Additions**

Plaintiffs have also added alter ego allegations that Sandton Capital Partners, L.P. and Sandton Capital Partners, LLC are alter egos of one another and Thomas Wood and Rael Nurick, and that KB and several nonparty Sandton entities are also alter egos of one another. Plaintiffs state that these entities commingle funds, are undercapitalized for their respective undertakings, fail to observe corporate formalities, use each other's funds for their own use and projects, and, in general, function as a facade for Wood and Nurick, their dominant shareholders and only active general partners/directors/members. *See* Proposed Am. Compl. ¶¶ 11-12. These allegations are not palpably insufficient, as they may support a finding of alter ego liability under New York law. *See, e.g., Shisgal v, Brown*, 21 A,D,3d 845, 848-849 (1st Dep't 2005) (claim for piercing of corporate veil sufficiently pled where plaintiff alleged, inter alia, commingling of funds, undercapitalization and a disregard for corporate formalities).

In opposition to the motion, defendants contend that plaintiffs' proposed amended claims are contradicted by various evidence in the record, and inferences to be drawn therefrom, and that defendants will prevail on the merits. In making this argument, defendants "incorporate by reference" their pending motion for summary judgment addressed to the claims in the original complaint (*see* defendants' memorandum at 20). However, defendants misstate the relevant standards and inquiry on a motion to amend, where the function of the court is not to weigh the evidence or reach the merits, but rather, as previously discussed, to simply demonstrate that the proffered amendments are not devoid of merit. *See Lucido v. Mancuso*, 49 A.D.3d 220, 229 (2d Dep't 2008) ("[n]o evidentiary showing of merit is required under CPLR 3025(b)"]; *see, e.g., Miller v. Cohen*, 93 A.D.3d at 425 (reversing denial of leave where the trial court "prematurely reached the merits of the proposed amendment, which was adequately pleaded and not clearly devoid of merit"). "If the opposing party wishes to test the merits of the proposed [claims], that party may later move for summary judgment upon a proper showing." *Lucido*, 49 A.D.3d at 229.

Defendants also accuse plaintiffs of excessive delay in seeking leave to amend. However, courts generally do not consider a motion to be sought after an "extended delay" unless it is "filed significantly after the note of issue and certificate of readiness for trial." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 26 Misc.3d 1231[A], at *4

(Sup. Ct. N.Y. Cnty 2010); *accord McFarland v. Michel*, 2 A.D.3d 1297, 1299 (4th Dep't 2003) (no "extended delay" where "[t]he motion was made either one week of the filing of the note of issue and certificate of readiness and was made within 1½ years of the filing of the complaint"). That is certainly not the case here, as the motion was filed prior to the new September 1, 2013 note of issue deadline.

Moreover, "even inordinate delay is not a barrier to the amendment" unless it is "coupled with significant prejudice." *Endicott Johnson Corp. v. Konik Indus.*, 249 A.D.2d 744, 744 (3d Dep't 1998) (citing *Seda v. New York City Hous. Auth.*, 181 A.D.2d 469, 470 (1st Dep't 1992). Here, defendants fail to demonstrate substantial prejudice resulting from the proposed amended pleading. "[D]efendants cannot legitimately claim surprise or prejudice, where the proposed amendments [are] premised upon the same facts, transactions or occurrences alleged in the original complaint." *Janssen v. Inc. Vill. of Rockville Ctr.*, 59 A.D.3d 15, 27 (2d Dep't 2008). Nor can prejudice be shown where the nonmovant has been aware of the factual basis of the proposed amendment through prior motions, discovery or documents in its own possession. *Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502, 505 (1st Dep't 2011); *see, e.g., Reyes v. City of New York*, 63 A.D.3d 615, 616 (1st Dep't 2009) (affirming trial court's decision to grant plaintiff leave to amend on the eve of trial to plead prior written notice where actual notice was mentioned in prior pleading).

Plaintiffs' proposed new causes of action rest either on facts previously alleged by them in the original complaint, or previously known by defendants. For instance, although defendants contend that they are prejudiced by the addition of the new allegations and causes of action, one of the primary communications evidencing the 2008 Refinancing Agreement was presented to this court by defendants on November 15, 2010. *See* Affirmation of Daniel H. Bryan ¶ 13; *see id.* Ex. U. In addition, defendants were placed on notice of plaintiffs' claim that defendants breached their obligations under the Loan Documents by plaintiffs' affirmative defenses. *Id.* ¶ 13; *see id.* Ex. T. With respect to the tortious interference claims, defendants took extensive deposition testimony from plaintiffs on this subject, including interference with the prospective 2010 refinancing agreement between plaintiffs and KEF. Finally, plaintiffs' claims for conversion and wrongful repossession are based on defendants' alleged actions after the filing of the original complaint.

Accordingly, plaintiffs' motion for leave to amend the complaint is granted. However, the court cautions plaintiffs that, at this late stage of the litigation, any further amendments likely will be disfavored.

B. *Plaintiffs' Motion For Leave to Amend Their Reply to Counterclaims (Motion Sequence No. 024)*

Plaintiffs move for leave to amend their reply to defendants' counterclaims, and to conform their pleading to the facts previously adduced with respect to plaintiffs' standing defense. Plaintiffs contend that defendants lack standing to enforce the Note because the Note is not indorsed; the purported allonge which transferred the Note to defendants is not affixed to the Note; the documents on which defendants rely for standing are materially different than those they describe as the "originals"; and, Rondall Garland, the signatory of the documents purporting to convey the Note to defendants, lacked authority to bind KEF thereto. Plaintiffs raised the standing defense in their original complaint (*see* Compl. ¶¶ 45-52), extensively explored this defense in discovery – both during depositions and through document requests – and again raised this defense in their opposition to defendants' pending motion for summary judgment.

Plaintiffs' motion to amend is granted. Under CPLR 3025(c), "[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence." Accordingly, where, as here, the substance of an affirmative defense has been raised and explored in discovery, and briefed on summary judgment, the responsive pleading should be deemed amended to include that defense. *Rivera v. N.Y. City Transit Auth.*, 11 A.D.3d 333, 333 (1st Dep't 2004) ("Although defendants have not pleaded the affirmative defense of medical emergency in their answers, in view of the evidence

submitted in opposition to plaintiff's motion we deem defendants' answers to amended to assert the defense"); *accord Ramos v. Jake Realty Co.*, 21 A.D.3d 744, 746 (1st Dep't 2005) (complaint deemed amended to assert a claim of vicarious liability in opposition to summary judgment).

Moreover, taking the facts as alleged, plaintiffs' standing defense is not palpably insufficient. Defendants allege that they have standing by virtue of an assignment of the Loan Documents from KEF. However, plaintiffs allege that the only evidence of an assignment of the Note to defendants was a two paragraph "allonge," but that the multiple and contradictory allonges proffered by defendants fail to establish a valid assignment. Plaintiffs' allegations, if true, could establish that standing does not, in fact, exist.

For the assignment and negotiation of the Note to be effective, "[a]n indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." *See* N.Y. U.C.C. § 3-202(1)-(2). In addition, an allonge is only permissible when there is insufficient room on the promissory note itself. *See* N.Y. U.C.C. § 1-303.

Plaintiffs allege that, because the Note had ample room to set forth the assignment, the allonge is void and impermissible as a matter of law under § 1-303. Plaintiffs further allege that, even if the allonge was valid, defendants have not shown that the allonge was properly attached to the Note and delivered in that form. These allegations may

demonstrate that defendants do not have standing to enforce the Note. *See Slutsky v. Blooming Grove Inn, Inc.*, 147 A.D.2d 208, 212 (2d Dep't 1989) (holding that plaintiff failed to properly transfer note where there was no indorsement "firmly affixed" to note).

Plaintiffs also allege that defendants have failed to show that KEF divested itself of the Note in defendants' favor. It is fundamental that "[i]n order for an assignment to be valid, the assignor must be divested of all control over the thing assigned." *TPZ Corp. v. Dabbs*, 25 A.D.3d 787, 789 (2d Dep't 2006) (citing cases). Plaintiffs allege that Garland was the signatory on the PSA and related documents, but that at the time the PSA was signed, Garland was not a KEF employee and lacked authorization to bind KEF. These allegations, if true, also lend support to plaintiffs' lack of standing defense. As such, contrary to defendants' arguments, the defense does not lack merit.

In addition, although defendants contend that they will suffer unfair prejudice and surprise if the motion is granted, defendants fail to show that plaintiffs' proposed amendment poses any threat of prejudice. It is well established that an amendment will not cause prejudice either where (1) it is based on facts known to the opposing party, *Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d at 505 (granting motion for leave to amend where non-movant "had notice of the claim [to be added] from the inception" of the case); (2) it embodies a theory previously disclosed in correspondence, pleadings or prior briefing, *Kennelly v. Mobius Realty Holdings, LLC*, 33 A.D.3d 380, 382 (1st Dep't

2006) (prejudice not shown where party opposing the amendment to add fraud claim had opportunity to oppose claim in prior briefing); or (3) it is predicated on facts learned by the movant only through discovery, *Briarpatch Ltd., L.P. v. Briarpatch Film Corp.*, 60 A.D.3d 585, 585 (1st Dep't 2009) (no prejudice shown where amendment was based on opposing party's belated discovery responses).

Defendants have been fully aware of the facts underlying plaintiffs' standing defense throughout the case, given the allegations in the complaint, the exhaustive discovery on this issue, and extensive briefing of plaintiffs' standing defense in connection with defendants' motion for summary judgment. Where, as here, the non-movant is on notice of the matter giving rise to the defense, and will therefore suffer no prejudice or surprise, the pleadings can and should be amended to conform to the proof pursuant to CPLR 3025. *See, e.g., Brook-Hatton Util., Inc. v. 893 Constr. Corp.*, 180 A.D.2d 660, 661 (2d Dep't 1992) (citing *Edenwald Constr. Co. v. City of New York*, 60 N.Y.2d 957 (1983)).

Accordingly, plaintiffs' motion for leave to file the proposed amended reply is granted, and defendants' request for costs and fees related to defending this motion is denied.

C. *Defendants' Motion for Summary Judgment (Motion Sequence No. 16)*

Defendants move for summary judgment dismissing the complaint, as well as for summary judgment on counterclaim-plaintiff KB's first through fourth and seventh through ninth counterclaims.

However, because plaintiffs' motions for leave to amend the complaint and their reply to defendants' counterclaims are being granted, the motion for summary judgment is denied as moot, without prejudice, with leave to renew such motion upon the service and filing of the amended complaint and amended reply. *See, e.g., De Medici v. Lorenzo De Medici, Inc.*, 101 A.D.2d 719, 720 (1st Dep't 1984) (affirming grant of plaintiff's cross motion to amend and denial of defendant's motion for summary judgment as moot); *see also WDF, Inc. v. City of New York*, 104 A.D.3d 557, 557 (1st Dep't 2013).

D. *Plaintiffs' Motion to Compel Compliance by KEF (Motion Sequence No. 021)*

In motion sequence no. 21, plaintiffs seek to compel the production of documents by KEF related to, *inter alia*, communications between KEF and defendants regarding plaintiffs.

On April 26, 2011, plaintiffs served KEF with a subpoena duces tecum. On June 13, 2011, KEF responded to the subpoena by stating a number of objections thereto. On October 7, 2011, KEF made an initial production of approximately 1800 pages. By letter

dated January 25, 2012, plaintiffs' counsel contended that KEF's production was deficient. By letter dated February 22, 2012, KEF agreed to conduct an additional review of its documents and electronic files, and on June 7, 2012, made an addition production of 301 pages.

In addition, on May 30, 2012, plaintiffs issued a subpoena ad testificandum, seeking to depose KEF in connection with this litigation. KEF provided Ronald Garland and Robert Hawley as witnesses, and these depositions took place over the course of three days in June and July 2012. Throughout June and July 2012, KEF provided plaintiffs with a number of additional documents to supplement its production. On August 29, 2012, plaintiffs provided KEF with a list of documents it had requested during the depositions. On January 22, 2013, KEF provided over 100 pages of documents in response to the requests made in the August 29th letter.

On April 11, 2013, plaintiffs provided KEF's counsel with a 56-page single-spaced letter alleging deficiencies in KEF's document production. KEF protested, and in May 2013, plaintiffs filed the instant motion.

On June 12, 2013, at oral argument on plaintiffs' motion, this court directed plaintiffs and KEF to engage in further meet and confers to narrow their discovery disputes. In a letter to this court dated August 30, 2013, plaintiffs contend that they have reduced their discovery requests by approximately 20% on Schedule A (the schedule

outlining the subject matter areas for which KEF failed to produce documents) and approximately 40% on Schedule B (the schedule outlining the documents produced by KEF that had technical deficiencies). *See* 8/30/13 letter, Ex. A. Plaintiffs represent that, during a meeting on June 26, 2013, KEF acknowledged that it would provide a remedial production correcting the technical deficiencies described in Schedule B. With respect to the alleged substantive deficiencies on Schedule A, KEF expressed a preference for attempting to achieve compliance by using its Litigation Support Services team to search selected custodians' files for specific key words. However, on August 29, 2013, because of the loss of a majority of its litigation support team, KEF represented that it needed an additional month to complete its production. KEF and Gama entered into a stipulation dated August 30, 2013, pursuant to which KEF agreed that it would use its "best efforts" to complete its supplemental production by September 30, 2013.

In the August 30, 2013 letter, plaintiffs request that the court rule only on that portion of the motion which seeks to compel KEF to produce communications between it and defendants concerning this litigation, the Loan Documents, and the Purchase and Sale Agreement for Distressed Trades (the "PSA"), the agreement pursuant to which defendants purchased the Loan Documents from KEF, including documents in the possession of KEF"s counsel, as the parties have been unable to reach an agreement on this issue.

New York law requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." *See* CPLR 3101(a); *see also Kavanagh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952, 954 (1998) (pretrial discovery is to be "open and far-reaching"). This rule is liberally construed, with the terms "material" and "necessary" encompassing "'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Andon v. 302-304 Mott St. Assoc.*, 94 N.Y.2d 740, 746 (2000) (citation omitted). However, while courts generally give the phrase "material and necessary" a broad construction, "'unlimited disclosure is not permitted.'" *Tower Ins. Co. of N.Y. v. Murello*, 68 A.D.3d 977, 977 (2d Dep't 2009) (citation omitted). Indeed, discovery requests which are overly broad or seek material not relevant to the issues in the litigation are not proper. *Taji Commc'n, Inc. v. Bronxville Towers Apt. Corp.*, 48 A.D.3d 551, 552 (2d Dep't 2008) (reversing order compelling party to respond to discovery requests seeking irrelevant material); *Show Lain Cheng v. Young*, 60 A.D.3d 989, 991 (2d Dep't 2009) (upholding denial of motion to compel party to respond to discovery requests which were irrelevant to issues of the case). Because of this policy of full disclosure, "the burden of establishing any right to protection is on the party asserting it," and "the protection claim must be narrowly construed." *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991).

Plaintiffs request that the court require KEF to produce communications between it and defendants (including correspondence between KEF's counsel and defendants' counsel) concerning plaintiffs to date, including with regard to their cooperation with each other in the litigation on both discovery and substantive issues. These documents include KEF's and defendants' initial communications following the commencement of plaintiffs' reformation claim, plaintiffs' requests for affidavits from KEF and KEF's provision of these affidavits, and agreements between defendants and KEF regarding how KEF would respond to plaintiffs' document requests.

Plaintiffs' motion to compel is denied, and KEF's cross motion for a protective order is also denied as moot. Despite its status as a nonparty, for two years, KEF has attempted to cooperate with plaintiffs' subpoena, producing documents on at least four occasions, as well as making its employees available for two depositions over the course of three days. In waiting over two years to seek to compel production of yet more documents – and then only after the already-extended note of issue was about to expire, and a summary judgment motion filed – plaintiffs have waived any right they possessed to the production of additional documents from nonparty KEF.

Although CPLR 3122 does not impose a time limit upon a party seeking discovery to bring a motion to compel production, "[i]f a party fails to make a motion to compel within a reasonable time, she may forfeit the right to obtain the items sought." Patrick M.

Connors, Practice Commentaries, McKinney's Cons. Law of NY, Book, 7B, CPLR C3122:1. New York courts have consistently held that motions to compel that are filed late in a case, and long after the initial requests were made, are inappropriate and inexcusable, and should be denied without further consideration. *See Remark Elec. Corp. v Manshul Constr. Corp.*, 242 A.D.2d 694, 695 (2d Dep't 1997) ("appellant is guilty of inexcusable delay by waiting approximately ... 20 months before seeking to compel answers to the interrogatories," which warranted outright denial of motion to compel without any consideration of the substantive merits of the motion); *Lee v. Granoff*, 2009 WL 969726 (Sup. Ct. Kings Cnty 2009) (two-year delay in filing motion to compel deemed inexcusable).

Here, having waited over two years from the issuance of their subpoenas to move to compel KEF to produce documents, and nearly a year after KEF provided documents seeking to cure the deficiencies alleged in plaintiffs' January 2012 letter, plaintiffs cannot reasonably claim that their delay was excusable, particularly as KEF is not even a party to this litigation. Plaintiffs have had ample opportunity to take discovery from KEF, and as such, the motion to compel is denied.

The court also notes that, in any event, the information sought by plaintiffs, consisting of the 2012 communications between KEF and defendants, has no bearing on the main issue in this action – whether KEF and plaintiffs agreed to a 24 or 60 month

term in 2008, or whether defendants interfered with plaintiffs' contractual relations with KEF in 2010. As such, the information sought is irrelevant and non-discoverable. *See Taji Communc'n, Inc.*, 48 A.D.3d at 552; *Show Lain Cheng*, 60 A.D.3d at 991.

E. *Plaintiffs' Motion to Compel (Motion Sequence No. 022)*

In motion sequence no. 022, plaintiffs seek to compel defendants to produce documents responsive to plaintiffs' first notice for discovery and inspection, dated February 17, 2011 (the "First Notice") and second notice of discovery and inspection dated March 27, 2013 (the "Second Notice").

The First Notice was served in February 2011. Defendants' responses were served on April 19, 2011, and responsive documents were produced on May 2, 2011. Plaintiffs raised numerous issues with regard to defendants' production, and a brought a motion to compel which, inter alia, sought an unredacted version of the PSA. In a decision dated April 23, 2012, this court found that an unredacted version of the PSA was not relevant to plaintiffs' reformation claim, and declined to require defendant to produce full valuation reports. Plaintiffs appealed the order, and October 2, 2012, the First Department modified the order to compel defendants to produce an unredacted version of the PSA, and another document identifying certain information about the other loans in the pool.

Following the issuance of the First Department's order, beginning on October 10, 2012, defendants provided supplemental productions to plaintiffs.

On March 27, 2013, just one month before discovery was expected to conclude – and one week after defendants moved for summary judgment – plaintiffs served defendants with the Second Notice, which included production requests that were largely identical to those included in the First Notice. On the same day, plaintiffs served defendants a letter, raising, for the first time since defendants' initial production in May 2011, numerous alleged "deficiencies" in defendants' response to the First Notice. The Second Notice generally sought documents that had previously been requested in the First Notice, including documents with respect to defendants' document retention policies and preservation notices, and correspondence between defendants' counsel and KEF's counsel. On April 16, 2013, defendants responded to the document requests, and on April 22, 2013, defendants produced additional documents in a supplemental production.

Prior to the filing of this motion, the parties exchanged extensive correspondence about the alleged deficiencies in defendants' responses to the First Notice and the Second Notice. Three days after the original April 29, 2013 note of issue deadline, plaintiffs filed two motions to compel production from defendants. The instant motion seeks to compel defendants to produce documents responsive to the First Notice – which was issued in February 2011 – and the Second Notice – which is largely duplicative of the

First Notice, and was not served until two years later. In support of these motions, plaintiffs recycle the same arguments that they have made in numerous filings before this court about defendants' alleged misdeeds with regard to discovery, including that defendants have unjustifiably refused to respond to discovery, refused to prepare their corporate deponent, and failed to preserve documents.

On June 12, 2013, at oral argument of this motion, the parties were directed to meet and confer to narrow their discovery disputes. By letter dated August 12, 2013 to this court, plaintiffs contend that they reduced their discovery requests by 30% on Schedule A (the schedule outlining the subject matters for which defendants failed to produce documents) and 55% on Schedule B (the schedule outlining the documents produced by defendants that had technical deficiencies). According to plaintiffs, the parties met in person on June 26, 2013 to discuss their outstanding discovery objections, but were only able to resolve plaintiffs' technical discovery objections. Thus, plaintiffs now move only on their outstanding substantive requests set forth in Schedule A to the attached proposed order for motion sequence no. 22 (*see* 8/12/13 letter, exhibit A).

The outstanding substantive requests sought by plaintiffs fall within several "categories" of documents that plaintiffs label "case-critical" and allege are being wrongfully withheld by defendants. These categories of documents include (1) communications concerning the Loan Documents and the PSA between defendants and

their advisory committee, with KEF, internally between defendants' employees, and with Nicholas Cerretani and Aircraft Evaluations; (2) documents concerning Sandton's valuation and performance analysis of the Loan Pool; and (3) document preservation notices and calendars of appointment.

Parties may seek relevant evidence from each other by issuing discovery notices pursuant to CPLR 3120. If a party objects to a production request, "[t]he party seeking disclosure under rule 3120 ... may move for an order under rule 3124 or section 2308 with respect to any objection to, or other failure to respond to or permit inspection as requested by, the notice or subpoena duces tecum, respectively, or any part thereof." CPLR 3122(a)(1); *see also* CPLR 3124 ("If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article ... the party seeking disclosure may move to compel compliance or a response").

"While a party should be given the opportunity through disclosure to acquire facts essential to justify its opposition to a motion for summary judgment ... the claim that further disclosure is needed it not persuasive where such a party has by its own inaction not moved to obtain it." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Glass Check Cashing Corp.*, 177 A.D.2d 419, 420 (1st Dep't 1991) (affirming denial of plaintiff's demand for additional discovery, made in response to motion for summary judgment, where plaintiff had more than 15 months to seek the information); *see also Forshay v.*

Star Dairy, 187 A.D.2d 838, 839 (3d Dep't 1992) (affirming grant of summary judgment in favor of defendant because "the claim that further disclosure is needed is not persuasive insofar as plaintiff, by his own inaction, has failed to act diligently in attempting to obtain pretrial discovery"); *Moxon v Barbour*, 106 A.D.2d 558, 559 (2d Dep't 1984) (reversing denial of summary judgment in part based on court's reasoning that because defendant did not seek discovery for more than 8 months, defendant "should not be allowed to claim that facts cannot be stated where her own voluntary inaction is the cause of the lack of knowledge"); *Silinsky v. State-Wide Ins. Co.*, 30 A.D.2d 1, 5-6 (2d Dep't 1968) (affirming grant of summary judgment despite defendant's claim to need additional disclosure because plaintiff "failed to ascertain the truth due to its own voluntary inaction" in not seeking discovery for ten months); 3 NY Practice Commercial Litigation in NY State Courts § 25:60 (3d ed.) ("given the cost and complexity associated with electronic production and the pressure Commercial Division justices – in fact all justices – are under to expedite discovery, any 'glitches' in the production should be brought to the producing party's attention immediately, and to the court's attention promptly if the problem cannot be amicably and satisfactorily resolved").

Plaintiffs' motion to compel the production of documents is denied, as they have waived any claim with respect to alleged "deficiencies" in defendants' production. The First Notice sought, *inter alia*, the production of all documents concerning the Aircraft

(request no. 1); all documents, including communications and due diligence documents, concerning the Loan Documents (requests nos. 2, 4, 10, 12); all documents, including communications, concerning the PSA (request nos. 3, 5); all documents concerning any valuation of or performance analysis of the Loan Documents and the PSA (request nos. 6-7); all documents concerning defendants' valuation of the Aircraft, including estimates regarding its projected devaluation if operated or stored (request no. 33); and all documents concerning Nicholas Cerretani and the Cerretani Aviation Group (request nos. 31-32). *See* 5/23/13 Affirm. of Peter K. Rydel, Ex. A.

The Second Notice contains numerous requests seeking documents that either were (1) expressly included in the First Notice, or (2) encompassed in the First Notice and requested with "more narrowly-tailored" language in the Second Notice. *See* Second Notice, request nos. 1, 3-8, 21-23; *see id.*, Ex. E. The Second Notice seeks the following "categories" of documents: (1) communications concerning the Loan Documents and the PSA between defendants and their advisory committee, with KEF, internally between defendants' employees, and with Nicholas Cerretani and Aircraft Evaluations; (2) documents concerning Sandton's valuation and performance analysis of the Loan Pool; and (3) document preservation notices and calendars of appointment. Except for the request for document preservation documents, every single category of documents sought by plaintiffs in the motion to compel was already requested by plaintiffs in the First

Notice. Indeed, in the motion to compel, plaintiffs repeatedly note that the categories of production that they seek to compel "should have been produced" in response to both the First Notice and the Second Notice. *See, e.g.,* Pls.' Br. at 10 n.5, 12 n.8, 13 n.9, and 14 n.10. By these statements, plaintiffs concede that they waited for nearly two years to bring these issues to the court's attention.

Plaintiffs have had defendants' production since May 2011 – more than ample time to discover the absence of those categories of documents that it refers to as "case-critical." Yet they waited until one month before the discovery deadline to even raise these issues for the first time, and waited until after the discovery deadline to bring these issues to the court's attention. Under the facts of this case, that unexplained delay is fatal to the motion to compel. *See, e.g., Forshay*, 187 A.D.2d at 839; *National Union Fire Ins. Co.*, 177 A.D.2d at 420; *Moxon*, 106 A.D.2d at 559; *Silinsky*, 30 A.D.2d at 5-6.

In addition, plaintiffs are not entitled to discovery of defendants' document preservation documents because they are not relevant to the issues in this litigation. Plaintiffs claim, in very general terms, that they are entitled to defendants' preservation notices, calendars and appointment books because there are "gaps" in defendants' production, and because Wood had a "limited recollection" at his deposition. *See* Pls.' Br at 20-21. However, plaintiffs do not identify the "gaps" in defendants' production that they claim entitle them to defendants' document retention policies, nor do plaintiffs

explain why Wood's testimony regarding these retention policies and defendants' discovery efforts is insufficient. Although plaintiffs claim generally that production of any calendars or appointment books would help them "ascertain the dates of important meetings or conversations" due to Wood's allegedly "limited recollection," plaintiffs do not point to any such meeting or conversation. If the date of an important meeting or conversation was in dispute and was material to the litigation, plaintiffs would have raised this issue when defendants made their first production over two years ago.

Accordingly, plaintiffs' motion to compel the production of documents responsive to the First Notice and the Second Notice is denied.

F. *Plaintiffs' Motion to Compel Compliance With Interrogatories (Motion Sequence No. 023)*

In this motion, plaintiffs seek to compel accurate and complete responses to their second set of interrogatories (the "Second Interrogatories"). Plaintiffs issued their first set of interrogatories to defendants in April, 2011, to which defendants provided timely responses. Plaintiffs issued the Second Interrogatories in late November 2012, approximately one month before what was then the deadline for filing the note of issue. The Second Interrogatories included 53 separate questions. In early January 2013, defendants served their responses and objections to the Second Interrogatories.

On February 21, 2013, plaintiffs sent defendants a letter describing alleged "deficiencies" in defendants' responses to 26 of the 53 interrogatories. Plaintiffs contended that defendants failed to respond to 15 interrogatories in their entirety, and provided incomplete responses to at least an additional 11 interrogatories. Plaintiffs also objected to two of defendants' general objections to the interrogatories. The parties held a meet and confer, but were unable to resolve all issues. In May 2013, plaintiffs filed this motion, seeking to compel defendants to produce "accurate and complete" responses to 26 of the 53 interrogatories.

The parties then met again, at the Court's direction, to discuss plaintiffs' outstanding discovery requests. Plaintiffs contend that they decreased their demand for supplemental interrogatory responses by 40%, and have revised their proposed orders and briefs accordingly. Plaintiffs further contend that, on July 8, 2013, defendants agreed to supplement their responses to the Second Interrogatories to respond only to Interrogatories 8 and 9, but made no attempt to cure any of the other alleged deficiencies.

Plaintiffs now seek an order directing defendants to respond to 13 interrogatories that they failed to answer, and to provide complete responses to 12 others that they have already answered (*see* plaintiffs' revised memorandum at 13). As set forth below, plaintiffs' motion to compel is granted to the limited extent that defendants are directed to

answer the interrogatories that they previously failed to answer. The motion is denied in all other respects.

Under CPLR 3101 (a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" means "relevant." *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 407 (1968). "'Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probably or less probably than it would be without the evidence.'" *People v. Giles*, 11 N.Y.3d 495, 499 (2008) (citation omitted).

Plaintiffs argue that their interrogatories target three factual areas "which are directly relevant to plaintiffs' claims and defenses." *See* Pls.' Revised Br. at 9 (attached to 8/12/13 letter as exhibit H). First, plaintiffs' interrogatories seek the identity of and information pertaining to individuals who are affiliated with defendants, participated in defendants' bid on the Loan Pool and execution of the PSA, had communications with KEF "relating to the subject transactions," or personally witnessed the events at issue. *Id.* at 9-10, *see* interrogatory nos. 7, 8, 21, 26 and 30. Plaintiffs' request for the mere identities of such individuals is routinely sought and disclosed in the civil context. *See, e.g., Hamdan v. New York Prop. Ins. Underwriting Ass'n*, 116 Misc.2d 706, 708-709 (Sup. Ct. N.Y. Cnty 1982) ("the public policy in civil actions is to disclose rather than

conceal witnesses' identities"). Indeed, it is clear that such identities would "lead to the disclosure of admissible proof." *Baxter v. Orans*, 63 A.D.2d 875, 875 (1st Dep't 1978); *see also Matter of New York County DES Litig.*, 171 A.D.2d 119, 123 (1st Dep't 1991). Accordingly, defendant must disclose all witness identities sought in the Second Interrogatories.

Moreover, to the extent that the Second Interrogatories seek information relating to communications between these fact witnesses, such information is likely to reveal "facts bearing on the controversy." *Andon,* 94 N.Y.2d at 746 (citation omitted). For example, communications with respect to the terms and structure of the Loan Documents and the PSA – which included a representation and warranty specifically bearing on the maturity term dispute – are plainly relevant to plaintiffs' claims. *See Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 99 A.D.3d 423, 425 (1st Dep't 2012) (evidence which might indicate KEF "knew there was a problem" with the Note is discoverable).

Next, plaintiffs' interrogatories seek information pertaining to defendants' knowledge of the agreements between plaintiffs and KEF, and KEF's desire to purchase the Loan. *See* interrogatories nos. 5, 6, 10, 36, 37 and 38. These interrogatories are directly relevant to defendants' state of mind, and the question of whether they intentionally interfered with the agreements between KEF and plaintiffs. *See, e.g., Ocean to Ocean Seafood Sales. v. Trans-O-Fish & Seafood Co.*, 138 A.D.2d 265, 266 (1st Dep't

1988) (reversing order striking interrogatories seeking evidence of defendants' state of mind in support of plaintiffs' intentional fraud claims). The court notes that the information sought by plaintiffs is particularly relevant to the new claims set forth in the proposed amended complaint premised on the 2008 Refinancing Agreement (the second and third proposed causes of action).

Third, plaintiffs' interrogatories seek information pertaining to defendants' "relationship with individuals or entities that are or potentially will be witnesses in this action." *See* Pls.' Revised Br. at 11; interrogatories nos. 2, 9, 33. This information is plainly relevant. A proper response will inform plaintiffs as to the type of discoverable information these witnesses possess, as well as their credibility. *See BAII Banking Corp. v. Northville Indus. Corp.*, 204 A.D.2d 223, 225 (1st Dep't 1994) (emphasizing importance of close business relationship between nonparty and party in finding relevance for purposes of discovery). Defendants have identified five persons who may have discoverable information, three of whom are not affiliated with the Sandton entities. How these individuals are connected to this dispute and its parties is a basic fact that will inform plaintiffs as to the role that these witnesses played and their potential biases. Such information is clearly discoverable. *See Polygram Holding, Inc. v. Cafaro*, 42 A.D.3d 339, 340-341 (1st Dep't 2007) (granting motion to compel where evidence sought was admissible for purposes of cross-examination and credibility).

Accordingly, defendants are directed to provide full and complete answers to interrogatory nos. 2, 5, 6, 7, 8, 9, 10, 21, 26 , 33, 36, 37 and 38, without regard to their general and specific objections.

However, plaintiffs are not entitled to an order compelling defendants to provide "accurate and complete" responses to interrogatories that they have already answered. With respect to 6 interrogatories that defendants answered "to the best of defendants' recollection" (*see* interrogatories 5, 7, 21, 26, 30 and 39), plaintiffs are asking this court to enter an order that defendants must "consult relevant documents" in framing their answers, and must also "seek relevant information from third parties to frame its responses." *See* Pls.' Br. at 22-24. Plaintiffs conclusorily assert that defendants did not undertake the necessary due diligence to answer such interrogatories. The court rejects these broad and unsupported allegations, and finds that defendants have substantially complied with their discovery obligations in answering these interrogatories.

The court has considered the remaining arguments, and finds them to be without merit.

III. Conclusion

Accordingly, it is hereby

ORDERED plaintiffs' motion to amend the complaint (motion sequence no. 020) is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that defendants' motion for summary judgment (motion sequence no. 016) is denied as moot, without prejudice and with leave to renew after the amended complaint is served and filed; and it is further

ORDERED that plaintiffs' motion for an order compelling nonparty Key Equipment Finance to comply with the subpoena duces tecum dated April 25, 2011 (motion sequence no. 021) is denied; and it is further

ORDERED that nonparty Key Equipment Finance's cross motion for a protective order (motion sequence no. 021) is denied as moot; and it is further

ORDERED that plaintiffs' motion for an order compelling defendants to produce documents responsive to plaintiffs' first and second notices of discovery and inspection (motion sequence no. 022) is denied; and it is further

ORDERED that plaintiffs' motion for an order to compel accurate and complete responses to their Second Set of Interrogatories (motion sequence no. 23) is granted to the limited extent that defendants are directed to fully and completely answer, without regard to the general or specific objections, Interrogatory Nos. 2, 5, 6, 7, 8, 9, 10, 21, 26 , 33, 36, 37 and 38, and is denied in all other respects; and it is further

ORDERED that plaintiffs' motion for leave to file a first amended and supplemental reply to defendants' counterclaims (motion sequence no. 024) is granted.

Dated: New York, New York
October 21, 2013

ENTER

Hon. Eileen Bransten