

Khan v Garg
2023 NY Slip Op 30148(U)
January 16, 2023
Supreme Court, New York County
Docket Number: Index No. 652334/2013
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X	
RAZA KHAN,	INDEX NO. <u>652334/2013</u>
Plaintiff,	MOTION DATE _____
- v -	MOTION SEQ. NO. <u>027</u>
VISHAL GARG, EDUCATION INVESTMENT FINANCE CORPORATION, 1/0 CAPITAL LLC, and EMBARK HOLDCO I, LLC,	DECISION + ORDER ON MOTION
Defendants.	
-----X	

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 027) 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1343

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is

Sadly,¹ this 2013 action, arising out of the parties' roles in Education Investment Finance Corporation (EIFC), continues.

In motion sequence number 027, plaintiff Raza Khan moves pursuant to CPLR 3025 to amend the first amended 2017 complaint in this 2013 action. (NYSCEF 1177, Notice of Motion.)

On February 2, 2017, on consent, plaintiff was permitted to amend the complaint to add 1/0 Capital LLC and Embark Holdco I LLC.² (NYSCEF 335, First Amended

¹ The court had hoped that after the decision in *Embark Corp. v Raza Khan*, the parties would resolve this matter and others. (See NYSCEF 684, July 14, 2022, Trial Decision in *Embark Corp. v Khan* [Index No. 652801/2013].)

² Plaintiff's first motion to amend the complaint to add 1/0 Capital LLC and Embark Holdco I, LLC was denied. (NYSCEF 168, June 29, 2014, Decision and Order [motion seq. no. 005].)

Complaint [FAC]; NYSCEF 339, Order.) In the 33-page FAC, Kahn alleged: (1) corporate deadlock as to the governance of EIFC such that the court should direct one party to buy out the other party;³ (2) breach of fiduciary duty by defendant Vishal Garg whose 14 alleged breaches include causing Phoenix Real Estate Solutions Ltd to breach its contract with Activist Special Advisory Services LLC (ASAS) (NYSCEF 335, FAC ¶¶74), a subsidiary of EIFC; (3) conversion by Garg of EIFC assets to purchase assets for EIFC but never assigning those assets to EIFC, e.g. shares of a senior secured note; (4) fraud by Garg; (5) tortious interference by Garg and 1/0 Capital LLC by inducing Phoenix Real Estate Solutions Ltd to terminate its contract with ASAS; (6) Garg's failure to execute ARAM Global corporate paperwork; (7) conversion of EIFC funds by Garg for MRU Lending's benefit; (8) unjust enrichment by Garg as to MRU Lending Holdco; and (9) an accounting. (NYSCEF 335, FAC.) Defendants filed counterclaims to the FAC, including claims for conversion, breach of fiduciary duty, and corporate waste and mismanagement. (NYSCEF 334, Answer with Counterclaims.) Defendants' motion to dismiss the FAC was granted, in part, and the fourth cause of action for fraud was dismissed against all defendants while the first, second, fourth, fifth, sixth, seventh, eighth, and ninth causes of action were dismissed against Embark Holdco I, LLC, leaving the third cause of action for conversion. (NYSCEF 360, May 30, 2018, Decision and Order.)

³ Justice Oing appointed Garg the custodian of EIFC. (NYSCEF 248, March 4, 2015, tr at 47:12-48:17; NYSCEF 335, FAC ¶¶135.)

The court was actively managing discovery⁴ until March 2, 2020,⁵ when COVID struck, causing the court to switch to virtual proceedings, during which time the number of judges was reduced, increasing the dockets of the remaining judges and a hiring freeze was imposed which reduced this court's staff to one law clerk.⁶ Fact discovery was complete by May 2020 and expert discovery was complete by October 23, 2020, though plaintiff never filed a note of issue. (NYSCEF 1229, Defendants' Memo of Law at 5.)⁷ Indeed, defendants filed motion sequence number 026 for partial summary judgment on December 31, 2020. (NYSCEF 1116, Notice of Motion.)

⁴ See e.g., NYSCEF 363, June 26, 2018 Discovery Order; NYSCEF 366, Aug. 21, 2018 Discovery Order; NYSCEF 371, Feb. 5, 2019 Discovery Order; NYSCEF 376, March 5, 2019 Discovery Order; NYSCEF 951, Oct. 24, 2019 Discovery Order; NYSCEF 972, Nov. 27, 2019 Discovery Order; NYSCEF 1058, Dec. 24, 2019 Discovery Order; NYSCEF 1064, Jan. 15, 2020 Order of Reference pursuant to CPLR 4301, parties consent to appointment of Hon. Kathleen A. Roberts (Ret.) as Special Referee to supervise discovery; NYSCEF 1069, Feb. 25, 2020 discovery Order.)

⁵ Justice Oing issued the preliminary conference order. (NYSCEF 170, July 11, 2014, Preliminary Conference Order.) Justice Oing stayed discovery on October 6, 2016, until January 9, 2017, during which time the parties were to amend pleadings. (NYSCEF 320, Order.) In July 2017, this court inherited Justice Oing's docket when he was elevated to the Appellate Division, First Department. Plaintiff fails to offer the court any support for his contention that discovery was stayed until 2018. (NYSCEF 1343, Kierych tr at 83:5-10.) Indeed, the record shows otherwise. (NYSCEF 195, Aug. 20, 2014, Notice of Motion to Quash Subpoena [Mot. 008]; NYSCEF 198, Aug. 20, 2014, Notice of Motion to Quash Subpoena [Mot. 009]; NYSCEF 220, Sept. 15, 2014, Notice of cross motion to compel compliance with subpoena; NYSCEF 233, Aug. 28, 2014, Affidavit in Support of Right to Inspect; NYSCEF 318, Aug. 17, 2016, Request for Status Conference.)

⁶ The court wishes to thank the parties for their patience while the court addresses its COVID backlog.

⁷ The court notes that plaintiff misrepresents defendants' "admission" on page 14 of their brief. Restating plaintiff's assertion, and characterizing it as "weakly," does not constitute an admission that plaintiff did not timely receive certain discovery until "December 2019/January 2020." (NYSCEF 1245, Plaintiff's Reply at 10 and n 8.) Therefore, the court accepts defendants' recitation of the procedural history.

In the second amended complaint (SAC), filed on January 4, 2021, plaintiff seeks to add new defendants: Better Mortgage Corporation and Better Holdco, Inc. (collectively, B&B), 1/0 Holdco LLC, 1/0 Capital Ltd,⁸ and Embark Corporation. (NYSCEF 1181, Red-lined Complaint; NYSCEF 1185, Khan Aff. ¶¶5.) Plaintiff alleges (1) corporate deadlock (same as Count 1 in FAC); (2) an accounting as to EIFC (same as Count 9 in FAC); (3) conversion of EIFC corporate funds and Senior Secured Term Note, as to Garg and Embark Holdco derivatively on behalf of EIFC (same in FAC); (4) alternatively to Count 2, unjust enrichment against Garg, derivatively on behalf of EIFC (alternate theory to SAC Count 3); (5) conversion of Asian Castle distributions against Garg, 1/0 Ltd. and 1/0 Capital for Khan individually (specifically, plaintiff alleges that defendants took administrative fees, subordinate management fees, and incentive fees which should have been distributed to Khan as a 25% shareholder in Phoenix Holdco's general partner [new])⁹ (NYSCEF 1180, SAC ¶¶200); (6) corporate waste and mismanagement against Garg who allegedly used EIFC's funds to pay legal fees related to a regulatory investigation of EIFC and legal fees paid to Garg's personal accountant's attorney derivatively on behalf of EIFC (new); (7) breach of fiduciary duty against Garg derivatively on behalf of EIFC (same as claim 2 in FAC); (8) misappropriation of trade secrets against B&B which interfered with EIFC's opportunity to do business with AVEX (B&B's predecessor) derivatively on behalf of EIFC (B&B

⁸ 1/0 Holdco LLC, 1/0 Capital Ltd would join 1/0 Capital LLC which was added the FAC. (Collectively 1/0).

⁹ SAC's Phoenix Holdco is not the same as FAC's Phoenix Real Estate Solution Ltd. Indeed, Judge Roberts barred plaintiff's questions about distributions made by Phoenix Holdco during Garg's deposition on the grounds that this issue was "too far afield" from the FAC. (NYSCEF 1225, Garg Deposition tr at 602:5-10.)

mentioned in ¶85 of FAC); (9) unfair competition resulting from Count 8 against B&B derivatively on behalf of EIFC (B&B mentioned in ¶85 of FAC); (10) tortious interference with contract against Garg, 1/0 Ltd. and 1/0 Capital derivatively on behalf of EIFC (related to Count 5 of FAC); (11) tortious interference with prospective business against Garg, 1/0 Capital, and 1/0 Holdco by soliciting EIFC's employees and misappropriating EIFC's intellectual property derivatively on behalf of EIFC (related to Count 5 of FAC); (12) fraudulent concealment against Garg and Embark on behalf of Khan individually by misrepresenting or omitting Khan's interest in Embark's subordinate debt while Garg had a duty to disclose the conversion of debt to equity and issue shares to plaintiff (NYSCEF 1180, SAC, ¶¶247-249) (related to Count 3 of FAC); (13) conversion of Embark's subordinate debt against Garg and Embark on behalf of Khan individually (related to FAC Count 3) ; and (14) alternatively to Count 13, unjust enrichment of Embark's subordinate debt against Garg and Embark on behalf of Khan individually (related to FAC Count 3). (*Id.* ¶¶170-264.)

Pursuant to CPLR 3025, "leave to amend should be freely granted so long as the amendment is not plainly lacking in merit and there is no significant prejudice to the nonmoving party." "The burden of establishing prejudice is on the party opposing the amendment." (*Park v Home Depot U.S.A., Inc.*, 183 AD3d 645, 647 [2d Dept 2020].) "[L]eave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. A proposed amended complaint that would be subject to dismissal as a matter of law is, by definition, 'palpably insufficient or clearly devoid of merit' and thus should not be permitted under CPLR 3025. (*Olam Corp. v Thayer*, 2021 WL 408232, *3-4 [Sup Ct NY County 2021].)

Plaintiff's motion to amend the complaint is denied. "Prejudice may be demonstrated where the opposing party is hindered in its preparation of its case, where there is a significant expansion of the claims, or where the amendment is sought after discovery has been completed." (*Lattanzio v Lattanzio*, 13 Misc 3d 1241[A], *6 [Sup Ct NY County 2006] [citation omitted] *affd* 55 AD3d 431 [1st Dept 2008].) The SAC is not a minor modification or clarification, as plaintiff asserts. The court need look no further than the "technicolor" (NYSCEF 1343, Tr at 77:25) red-lined SAC and the 33-page FAC that grew to a 67-page SAC. (NYSCEF 335, FAC; NYSCEF 1180, SAC.) Claims are new. Parties are new. Plaintiff is doing more than filling out existing claims with information learned during discovery.

Discovery has been complete since October 2020, including eight expert reports from five expert witnesses. (NYSCEF 1229, Defendant's Memo of Law at 5.) Accordingly, defendants would suffer prejudice at this late date. (*See Wells Fargo Bank, N.A. v Morgan*, 139 AD3d 1046, 1048 [2d Dept 2016] [where motion to amend filed following the filing of a motion for summary judgment, "plaintiff established that it would suffer undue prejudice as the result of the defendant's unexplained delay of almost six years in seeking leave . . . to insert a multitude of new issues into the case;"] *Chichilnisky v Trs. of Columbia Univ.*, 49 AD3d 388, 389 [1st Dept 2008] [affirming denial of motion made six years after action commenced and completion of fact discovery].) Plaintiff variously asserts that he will seek "no new discovery" or discovery limited to books and records. (NYSCEF 1343, Kierych¹⁰ tr at 83:23-25.) However, plaintiff's discovery demand attached to motion 027 to amend and attorney's discovery

¹⁰ Rachel Kierych, Esq., is plaintiff's attorney.
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Motion No. 027

request¹¹ tells a different story. (NYSCEF 1182, Document Requests [11 pages]; NYSCEF 1235, Kierych Aff. ¶9.) Regardless of how plaintiff frames his discovery needs, the defendants are entitled to fact and expert discovery to defend themselves.

Effectively, plaintiff has no excuse for his delay in filing the SAC. (*See Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003] [denying motion “to amend was made without explanation as to the delay, over 10 years after the accident, over six years after the commencement of the action, long after the completion of discovery and filing of the note of issue, over four years after the first trial of this action and over 1 1/2 years after the decision on the prior appeal.”].) While plaintiff explains the delay by blaming defendants for concealing evidence critical to plaintiff’s amendments, Judge Roberts described defendants’ discovery conduct otherwise. (*See* NYSCEF 1080, Judge Roberts Aug. 31, 2020 Decision at 36-37, n. 23 [denying plaintiff’s request for discovery sanctions as it was “not supported by a single document,” was “simply false,” and reflected “a troubling carelessness in the use of the record, and unprofessional advocacy.”].)

Moreover, defendants have demonstrated that some of the discovery critical to the SAC, according to plaintiff, was produced long ago. For example, the documents on which plaintiff relies for the unfair competition (Count 9), trade secret misappropriation (Count 8), and tortious interference claims (Counts 10 and 11) were produced in 2019.

¹¹ Plaintiff’s new proposed discovery demand: “Any additional discovery is limited in scope to damages for Counts 3-5 of the proposed Second Amended Complaint: Phoenix Holdco LP’s and Structured Credit’s books and records (production should take no more than a week or two); Supplemental damages expert report solely on Counts 3-5; and, A limited deposition of Khan on these Counts, if Defendants so choose (2-3 hours).” (NYSCEF 1235, Kierych Aff. ¶9.)

(NYSCEF 1224, Skarlatos Aff. ¶4, chart.)¹² Similarly, the documents on which plaintiff relies to add Embark were produced in November 2018. (*Id.* ¶4.) Further, the court cannot overlook the discovery plaintiff collected in the many other related actions¹³ and Phoenix arbitration. (NYSCEF 279, Demand for Arbitration and Amended Statement of Claim.)

Plaintiff's motion to amend the eighth and ninth Counts against B&B is denied for the additional reason that plaintiff has known about them since 2017. In the FAC, plaintiff alleges that "on information and belief" Garg "utilized [EIFC's] intellectual property and data at his new company, Better Mortgage." (NYSCEF 335, FAC ¶85.) However, there was no cause of action in the FAC for this purported theft and B&B was not added as a defendant when plaintiff amended in 2017. Rather, in September 2020, plaintiff's damages expert opined that "[i]n the but-for world where the IP misappropriation and breach of fiduciary are assumed to have not occurred, one can reasonably conclude that EIFC would have been a shareholder in [Better]" and that EIFC, therefore, should receive a portion of the value of B&B's equity. (NYSCEF 1227, Sept. 11, 2020, J. Duross, O'Bryan CPA, Expert Report, ¶¶66, 77.)¹⁴ Accordingly, the court rejects plaintiff's argument that plaintiff did not have the requisite information until discovery was complete in this action. Further, Counts 8 and 9 against B&B are barred

¹² Sofia A. Skarlatis, Esq. is defendants' attorney.

¹³ See e.g., *Embark Corp. v Raza Khan*, Index No. 652801/2013; *Education Investment and Finance Corporation v Embark Corp. et. al.*, Index No. 155818/2014; *Embark Holdco I LLC v Embark Corp. et. al.*, Index No. 652552/2014.

¹⁴ Plaintiff shall follow the court's sealing and redacting procedures and file this redacted report unredacted (NYSCEF 1227) and under seal as well as plaintiff's reply (NYSCEF 1245).

by the statute of limitations. Plaintiff challenges defendants' statute of limitations argument because B&B and Garg are united in interest.

"Leave to amend to add a party is subject to the same permissive standard. Where the claim against the new party would otherwise be barred by the applicable statute of limitations, the claim may nonetheless be asserted upon demonstrating that (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well."

(*Pansini Stone Setting, Inc. v Crow and Sutton Assoc., Inc.*, 46 AD3d 784, 786 [2d Dept 2007] [citations omitted] [new claim against insurance company, which had assumed the obligation of surety that was at issue in action initially, satisfied the requirements for united in interest.]) Even if Garg and B&B are united in interest, as plaintiff asserts, a mention in paragraph 85 of the 264 paragraph FAC is hardly sufficient to put defendants on notice that B&B is a target of the FAC too; there was no claim against B&B. A claim in an amended pleading relates back to "the original pleading [where that original pleading] gives 'notice of the transactions, occurrences . . . to be proved pursuant to the amended pleading." (*Giambrone v Kings Harbor Multicare Ctr*, 104 AD3d 546, 548 [1st Dept 2013]; CPLR 203[f] [citation omitted].) Plaintiff's motion to amend the Counts 8 and 9 is denied.

Plaintiff's motion to amend Count 5 for conversion is denied for the additional reason that it is time barred. Under CPLR 214 (3), the statute of limitations for conversion is three years, which begins to run on the date of the alleged conversion.

(*Harlem Capital Ctr., LLC v Rosen & Gorden, LLC*, 145 AD3d 579, 580 [1st Dept 2016])

[citation omitted].) Count 5 of the SAC is based on new allegations that Garg and others converted distributions that Phoenix Holdco and CDOs owed to plaintiff in 2009-2011, 2014 and 2016. (NYSCEF 1180, SAC ¶¶43-51, 70, 11, 199-2029.) There is no relation back to the FAC with regard to the fifth cause of action. Plaintiff's mention of Phoenix Real Estate Solutions Ltd in the FAC does not open the door to any and all claims thereafter about Phoenix Holdco or any other entity name Phoenix; it must be related. Plaintiff's FAC claims are simply not related to the SAC's Count 5.

Plaintiff's motion to amend the conversion claims in Counts 4, 5, and 13 is denied for the additional reason that they are predicated on contracts. Plaintiff alleges that the rights and obligations of investors in Embark's subordinate debt—the basis of the conversion claim—were “memorialized in letter agreements.” (NYSCEF 1180, SAC ¶¶112, 256.) “A cause of action for conversion cannot be predicated on a mere breach of contract. . . . [where] plaintiff's conversion claim allege[d] no independent facts sufficient to give rise to tort liability and, thus, was nothing more than a restatement of his breach of contract claim.” (*Fesseha v TD Waterhouse Inv. Services, Inc.*, 305 AD2d 268, 269 [1st Dept 2003] [internal quotation marks and citation omitted].)

Likewise, plaintiff's motion to amend the unjust enrichment claims in Counts 4 and 14 is denied because Khan's rights are governed by a contract. (NYSCEF 1180, ¶¶112, 120.) The “existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes” recovery under unjust enrichment. (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987].)

Plaintiff's motion to amend the fraudulent concealment claim, in Count 12, is denied for failure to comply with CPLR 3016(b). “[W]here a cause of action is based in

fraud, the circumstances constituting the wrong shall be stated in detail.” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011].) Plaintiff fails to state the specific “misrepresentation or a material omission of fact which was false,” by either Garg or Embark. (*Id.*) Plaintiff also fails to identify the time, place, or manner in which such statements were made. (*Riverbay Corp. v Thyssenkrupp N. El. Corp.*, 116 AD3d 487, 488 [1st Dept 2014].)

Plaintiff’s motion to amend Count 11 for tortious interference with prospective business with AVEX (B&B was formerly known as AVEX) against Garg, 1/0 Holdco, and 1/0 Capital is denied for the additional reason that it is barred by the three-year statute of limitations. In Count 11 of the SAC, plaintiff alleges that Garg, 1/0 Holdco and 1/0 Capital tortiously interfered with EIFC’s prospective business relations with Avex. (NYSCEF 1180, SAC ¶¶199-202.) In the FAC, Count 5, plaintiff alleged that Garg and 1/0 Capital “intentionally induced Phoenix to terminate its contract with” ASAS, a subsidiary of EIFC. (NYSCEF 335, FAC ¶ 74, 180.) Plaintiff’s brief mention of B&B in the FAC is not sufficient to put defendants on notice about this claim regarding Avex. (*Id.* ¶85.) Plaintiff asserts that Garg was negotiating with Avex in 2012 or 2013. (NYSCEF 1180, SAC ¶ 82). Accordingly, the claim expired in 2016 at the latest. Certainly, Kahn was aware of B&B long before 2018 (3 years before motion 027 was filed on January 4, 2021). Accordingly, Count 11 is barred by the statute of limitations.

Plaintiff’s tortious interference in Count 11 fails for the additional reason that it is speculative. To state a claim for interference with prospective business relations, a plaintiff must allege that it would have entered into the contractual relationship but for the interference. (*Algomod Techs Corp v Price*, 65 AD3d 974, 975 [1st Dept 2009] *lv to*

appeal denied 14 NY3d 707 [2010].) Plaintiff alleges “[t]here was a reasonable probability that EIFC would enter into partnership with Avex Funding with the likelihood of future economic benefit to EIFC.” (NYSCEF 1180, SAC ¶¶241.) EIFC was pursuing AVEX in 2010, while defendants invested in B&B in 2013. (*Id.* ¶¶29, 80.) Plaintiff’s conjecture preceded defendants purported “interference” by three years making plaintiff’s allegation speculative and conclusory. (See *BDCM Fund Adviser, L.L.C. v Zenni*, 103 AD3d 475, 478 [1st Dept 2013] [affirming dismissal where plaintiff has “offered only a vague and conclusory allegation that [plaintiff] had a reasonable probability of a business relationship with” a third party].)

Defendants asks the court to dismiss the pending claims for corporate deadlock (Count 1), corporate waste and mismanagement related to defendants’ payment of legal and accounting fees (Count 6), and accounting (Count 9), each of which arise under Delaware law. The request is denied as to Counts 1 and 9 as there is no cross motion to dismiss and those counts are not new. As to Count 6, a new claim, defendants argue that Delaware law (8 Del. C. § 145[a]) permits a corporation to pay legal and accounting expenses provided that the indemnified party acted in good faith, but plaintiff’s failure to allege bad faith renders this cause of action deficient. Instead, plaintiff alleges Garg’s failure to act in EIFC’s best interest. (NYSCEF 1180 SAC ¶¶203-207.) Plaintiff’s motion for leave to amend Count 6 is denied for the additional reason that plaintiff fails to allege bad faith in the SAC which is not the same as alleged mismanagement.

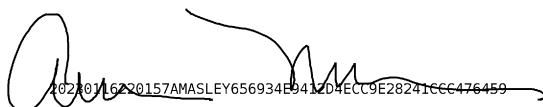
Defendants’ request for sanctions is denied. While plaintiff’s motion to amend is denied, his arguments are not frivolous. Further, given the litigious history of these

parties, the court is hard pressed to conclude that plaintiff's sole reason to amend the complaint is to harass defendants.

The court has considered all other arguments by all parties and finds they do not change the outcome.

Accordingly, it is

ORDERED that the motion to amend is denied.



1/16/2023

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: