

-----X
ALEXANDER GLIKLAD,

Plaintiff,

-against-

MICHAEL CHERNEY,

Defendant.
-----X

Index No. 602335/09

DECISION AND ORDER

Motion Sequence No. 023

MICHAEL CHERNEY,

Plaintiff,

-against-

ALEXANDER GLIKLAD,

Defendant.
-----X

MELVIN L. SCHWEITZER, J.:

Plaintiff Alexander Gliklad (Mr. Gliklad) moves, pursuant to CPLR 3126, to strike certain affirmative defenses and counterclaims of defendant Michael Cherney (Mr. Cherney). For the reasons set forth herein, the court grants Mr. Gliklad's motion to strike Mr. Cherney's First Counterclaim and First Affirmative Defense, and denies Mr. Gliklad's motion to strike Mr. Cherney's Ninth Affirmative Defense.

Background

On July 29, 2009, Mr. Gliklad initiated this action by moving for summary judgment in lieu of complaint to enforce a promissory note, dated October 11, 2003, in the amount of \$270 million (the Note). It is uncontested that Mr. Cherney's New York attorney prepared the Note, and that Mr. Cherney signed it as borrower. Mr. Gliklad claims the Note was

consideration for transferring his 26.37% equity interest in the Russian coal company KuzbassRazrezUgol (Kuzbass Coal) to Mr. Cherney and that he mistakenly signed his name under the term "borrower" on the Note because he was intoxicated, indicating that he and Mr. Gliklad shared a meal with plentiful amounts of alcohol before signing the Note in Vienna, Austria.

Mr. Cherney has repeatedly asserted that he believed he was signing as the witness, not as the borrower, on the Note. Mr. Cherney alleges that, in fact, Mr. Gliklad owes *him* the \$270 million for a loan that a company controlled and funded by him made between 1996 and 1998 to two entities in which Mr. Gliklad had an interest. The loan was allegedly made to finance the construction and development of a new railway system in Russia in conjunction with the Russian Ministry of Transportation.

The court denied Mr. Gliklad's motion for summary judgment. Since then both the parties and the court have expended substantial time and resources on this litigation. The parties have participated in numerous conferences, submitted correspondence to the court, filed numerous motions, taken depositions and otherwise actively engaged in discovery. The court has handed down several decisions, devoting its scarce resources to the resolution of the issues put before it.

Mr. Cherney alleges that the loan supporting his claim was made by Nash Investments Ltd. to Vitapoint Ltd. and Otava Invest and Trade Co. (the Nash/Vitapoint loan). Mr. Cherney first claimed – without providing supporting evidence – that none of the principal on the loan was repaid. Affidavit of Michael Cherney in Opposition to Motion for Summary Judgment

Pursuant to Promissory Note, dated August 25, 2009 (Mr. Cherney's August 25, 2009 Affidavit),

¶ 16. However, after Mr. Gliklad produced evidence supporting his claim that the Nash/Vitapoint loan was repaid and could not be the basis for Mr. Cherney's contention that he was the witness and not the borrower on the Note, Mr. Cherney radically changed his position. He conceded that the loan had been largely repaid and accepted the validity of a number of Mr. Gliklad's supporting documents. Defendant Michael Cherney's Memorandum of Law in Opposition to Motion to Strike Pleadings, dated April 6, 2012 (Mr. Cherney's Memorandum) at 17.

The affirmative defenses and counterclaims Mr. Gliklad seeks to strike in this motion are set forth in a pleading entitled Revised Affirmative Defenses and Counterclaims, dated November 20, 2009 (Mr. Cherney's Revised Affirmative Defenses and Counterclaims). In this pleading, Mr. Cherney alleges Mr. Gliklad owes him \$270 million, not the other way around. Mr. Cherney alleges the following:

8. That this action is utterly baseless is also established by the seven-page affidavit of Gliklad, dated September 15, 2009, filed in opposition to Cherney's motion to dismiss or stay this action. One searches in vain for even one single well-pleaded allegation of fact concerning the alleged deal between Gliklad and Cherney pertaining to Kuzbas Coal. The closest Gliklad comes is in paragraph ¶ 11(q), in which Gliklad states that after having made "a multi-million dollar investment in Kuzbas, and serving as its Chairman, I have not received any money back from Chernoi as agreed or from anyone else." He further writes that, because Kuzbas was a "huge and very significant company . . . [i]t only makes sense that Chernoi would pay me for my having agreed to cede my position and compensation for my investment." However, Gliklad *does not aver any specifics whatsoever* of what that agreement might be, and he does not attach or reference a single contract or other document which specifies what the terms of any deal involving Kuzbas were. Gliklad's allegations regarding Kuzbas are an abject fabrication. If there was any documentary evidence to support the existence of

such a deal, to be sure, Gliklad's lawyers, Winston & Strawn, would have provided it to the court as some proof of the truth of what their client was saying.

9. In fact, the truth of the matter is disclosed in Exhibit H to the Affidavit of Michael Cherney, sworn to on August 25, 2009. This Affidavit and Exhibit H had been filed at the time of Mr. Gliklad's affidavit dated September 15, 2009, and indeed, in his affidavit of September 15, 2009, Mr. Gliklad takes issue with certain statements made in Mr. Cherney's August 25, 2009 affidavit but not with the correctness of Exhibit H. Exhibit H is a two-page "Statement of Facts" to which the court is respectfully referred. This document summarizes all material investments and transactions between Mr. Cherney and entities controlled by him, on the one hand, and Mr. Gliklad and entities controlled by him, on the other hand. On page 2 of the Statement of Facts, under "Contracts," there is a summary of a "Deed" of July 7, 1999, signed between Gliklad and a representative of Cherney. Per the Statement of Facts, the Deed certifies that the liabilities of Gliklad to Cherney sum to \$269,445,709 (on the Russian Railway transaction) plus an additional \$13,553,849 "for the purchase of shares in KuzbasRazrezUgol." Thus, as of this date, July 7, 1999, *it was Gliklad who owed Cherney money on Kuzbas and not the other way around.*

10. On April 6, 2001, a meeting was held in New York among Alexander Gliklad, two attorneys then affiliated with Roberts & Holland (Stuart Gross and Peter Glicklich), Mr. Gliklad's son-in-law and Mr. Cherney's representative Robert Kessler. Contrary to the Gliklad Affidavit, Arik Kislin did not attend this meeting. Mr. Gross took notes of everything of a material nature which was discussed at the meeting and has maintained those notes without any alterations continuously since April 2001. The meeting was purely informational and no transactions of any kind were agreed upon or consummated.

11. The sole purpose of the meeting, as confirmed by Mr. Gross's own notes, was for *Mr. Gliklad to inform the representatives of Mr. Cherney when, where and how Mr. Gliklad would repay Mr. Cherney the massive debt which Mr. Gliklad still owed Mr. Cherney.* There was no discussion of any debt allegedly owed by Mr. Cherney to Mr. Gliklad.

12. At the April 6, 2001 meeting, as recorded in the Gross notes, Mr. Gliklad stated that he still owed Michael Cherney \$70 million. While this figure is a lie, for present purposes it is sufficient to note that Gliklad did *not* claim at the meeting that Cherney owed *him*, Gliklad, any money. Furthermore, this meeting occurred years after the Kuzbas coal transaction referred to in the

July 7, 1999 Deed. The meeting notes do not reflect that Kuzbas even arose, let alone that Cherney owed Gliklad any money as a result of the Kuzbas transaction.

13. In his affidavit, Mr. Gliklad offers no suggestion whatsoever, let alone any proof or evidence, that between the April 6, 2001 meeting in New York and the signing of the alleged note on October 11, 2003, transactions of any kind occurred between Gliklad, and entities under his control, and Cherney, and entities under his control. In fact, there were no such transactions.

14. In addition, after April 6, 2001, Gliklad never made one further payment of any kind to Cherney.

15. Therefore, the court should reform the alleged note to reflect the actual understanding between the parties, that Cherney is the witness and Gliklad is the borrower, under a note in the amount of \$270 million.

16. Alternately, the court should enforce the oral agreement reached between representatives of Cherney and Gliklad when it became clear that Gliklad would be unable to make full repayment of his \$270 million debt to Cherney. Under that agreement, Gliklad owes Cherney \$90 million, plus prejudgment interest.

17. In addition, because this litigation is patently "frivolous," within the meaning of applicable New York law, Cherney is entitled to a judgment which includes provision for his reasonable attorneys' fees, investigative expenses, court costs and any and all other case disbursements.

Mr. Cherney's Revised Affirmative Defenses and Counterclaims, ¶¶ 8-17 (emphasis in original). Based on these allegations, Mr. Cherney asserts, as his First Affirmative Defense and First Counterclaim, that the Note should be reformed to reflect Mr. Gliklad as the borrower and Mr. Cherney as the witness. *Id.*, ¶¶ 18-22; 41-46. Additionally, as his Ninth Affirmative Defense, Mr. Cherney asserts that the Note is void for lack of consideration. *Id.*, ¶¶ 37-38.

On July 14, 2011, the court rendered a Decision and Order in connection with an anti-suit injunction with respect to a lawsuit filed in Israel by Mr. Cherney relating to the matters in this

litigation. In it, the court noted that Mr. Cherney “has resisted discovery into the accounts that conclusively would prove whether or not the loan was repaid.” July 14, 2011 Decision and Order. Subsequently, the court granted Mr. Gliklad permission to move to compel the production of documents relating to repayment of the Nash/Vitapoint loan as well as Mr. Cherney’s interest in Kuzbass Coal. Mr. Gliklad then moved to compel production of the following documents requested in his Amended Notice for Discovery and Inspection, dated June 7, 2011 (Mr. Gliklad’s Amended Notice for Discovery and Inspection):

- All bank statements, wire transfer records, and/or tax returns related to payments received by Nash Investments Ltd., Arufa Invest and Trade, or any other entity allegedly related to Michael Cherney from Vitapoint Ltd., Otava Invest and Trade Co. or any other entity associated with the Russian Ministry of Railways transaction.
- All audited financial statements of Nash Investments Ltd. from 1996 through 2004.
- All documents related to Cherney’s investment in Kuzbass Coal, including but not limited to bank statements and wire transfer records. This includes but is not limited to documents related to Cherney’s acquisition or disposition of his interest in Kuzbass Coal.

Mr. Gliklad’s Amended Notice for Discovery and Inspection, Doc. Req. Nos. 5, 7, 9-12;
Memorandum of Law in Support of Plaintiff’s Motion to Compel Production, dated November 1, 2011 at 2; January 31, 2012 Decision and Order (January 31 Order) at 2-3.1

¹ Between November 2009 (when Mr. Gliklad served his First Notice for Discovery and Inspection) and May 2011 (when the court struck Mr. Cherney’s jurisdictional defense) the parties focused primarily on jurisdictional discovery. However, Mr. Gliklad requested the Nash/Vitapoint and Kuzbass documents in November 2009 in his First Notice for Discovery and Inspection and has done so repeatedly thereafter through letters and during conferences. First Notice for Discovery and Inspection, dated November 6, 2009 (Mr. Gliklad’s First Notice for Discovery and Inspection); Letter from W. Gordon Dobie to David E. Bamberger, dated January 14, 2010; Letter from W. Gordon Dobie to David E. Bamberger, dated July 12, 2010.

Mr. Gliklad argues that since he served his Amended Notice for Discovery and Inspection, he has requested these documents repeatedly during numerous meet and confers. In fact, as Mr. Cherney's attorney wrote in a letter to the court dated August 2, 2011, pursuant to the "deadline agreed upon during the July 26 status conference . . . [b]oth parties shall have completed their respective documents productions by August 30, 2011" Letter from Brian E. Maas to Joseph D. Hansen, dated August 2, 2011 (emphasis in original). Mr. Cherney has not complied with this deadline. Mr. Gliklad asserts that it was only after all of these futile requests that he was forced to seek a ruling from the court. On January 31, 2012, finding the requested documents to be material and necessary to the resolution of the claims and defenses at issue in this litigation, the court granted Mr. Gliklad's Motion to Compel, ordering Mr. Cherney to produce, within thirty days, the requested documents or a "sworn affidavit that the documents are not in his possession or control and he cannot produce them." January 31 Order at 3. The court further stated as follows:

In the event, with respect to the Nash/Vitapoint Documents, Mr. Cherney provides this affidavit in lieu of producing the documents, the court will entertain a motion to strike Mr. Cherney's First Affirmative Defense and his First Counterclaim from his Revised Affirmative Defenses and Counterclaims. In the event, with respect to the Kuzbass Coal Documents, Mr. Cherney provides an affidavit in lieu of production, the court will entertain a motion to preclude Mr. Cherney from arguing a lack of consideration for the Promissory Note.

Id. at 3-4.

Mr. Cherney did not produce the requested documents, but submitted an affidavit, sworn to on March 1, 2012. Mr. Cherney's Affidavit states in relevant part:

4. With respect to the Nash Documents, I have produced all such documents within my possession, custody or control. To the extent any additional documents exist, I cannot produce them because they are outside of my custody and control. As to my relationship with Nash, I refer to my response to Interrogatory No. 3 in Defendant's Responses and Objections to Plaintiff's Third Set of Interrogatories. . . .

7. With respect to the Kuzbass Documents, I have produced all documents related to Kuzbass in my possession or control. As to documents purportedly showing my acquisition in Kuzbass, I described fully in my response to Interrogatory No. 1 . . . my role in financing the purchase of Kuzbass shares by others and the economic interest that I received. I have never claimed that I personally owned shares in Kuzbass at any time. . . . Accordingly, I cannot produce the requested documents simply because they do not exist.

Affidavit of Michael Cherney in Further Opposition to Plaintiff's Motion to Compel the Production of Certain Documents, dated March 1, 2012 (Mr. Cherney's March 1, 2012 Affidavit), ¶¶ 4 and 7.

In his response to Interrogatory No. 3, Mr. Cherney explained that while he "provided funds to Nash," he "did not personally or directly own an interest in Nash." Rather, "entities in which he held a substantial interest ultimately owned Nash." Defendant's Responses and Objections to Plaintiff's Third Set of Interrogatories, dated December 27, 2011 (Mr. Cherney's Responses to Interrogatories) at 6.

In his response to Interrogatory No. 1, Mr. Cherney explained that he was a member of a joint venture which, in 1997-99, had indirectly acquired two blocks of Kuzbass Coal shares, each being approximately 25%. *Id.* at 4. Further, according to a 2002 Declaration which memorialized the structure of the joint venture, Mr. Cherney "either directly or through entities owned controlled or affiliated to him would provide the Venture with financing to enable the

acquisition of various investments and their financing requirements.” Declaration, dated July 1, 2002 (2002 Declaration) at 2. The other three members of the joint venture were responsible for supervising the management of the acquired companies. *Id.* at 3.

In response to Mr. Cherney’s submission of an affidavit in lieu of the requested documents, Mr. Gliklad now makes the instant motion to strike.

Discussion

CPLR 3126 provides, in relevant part:

If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed *pursuant to this article*, the court may make such orders with regard to the failure or refusal as are just, among them:

3. an order striking out pleadings or parts thereof. . . .

NY CPLR 3126 (emphasis added).

The parties dispute whether Mr. Cherney has violated the court’s January 31, 2012 Decision and Order. Mr. Gliklad argues that Mr. Cherney’s March 1, 2012 Affidavit is so inconsistent with his prior representations as to be in violation of the court’s January 31, 2012 Decision and Order. Mr. Cherney contends he has done exactly what the court permitted him to do in the absence of producing the requested documents – submit an affidavit explaining why he has not done so. The court need not determine whether Mr. Cherney has violated the court’s order, as the sanctions of CPLR 3126 may be imposed for noncompliance with the opposing party’s discovery demands. Indeed, this conclusion is evident from the plain language of the statute, given the conjunction “or” in the preamble.

Amendments to CPLR 3126, likewise suggest that refusal to obey a court order is not necessary for the imposition of sanctions. Prior to 1978, the italicized language above was absent, and it was unclear whether a party must obtain a court order to compel disclosure before seeking sanctions under CPLR 3126. *See Coffey v Orbachs, Inc.*, 22 AD2d 317, 318 n.* (1st Dept 1964). In *Coffey*, the court discussed differing views on the subject and decided that a motion for sanctions need not be preceded by an order to compel disclosure pursuant to CPLR 3124. *Id.* To clarify the issue, the court in *Coffey* suggested that “the Legislature should eliminate all doubt by adding the words ‘pursuant to notice duly served’ after the word ‘disclosed’ in CPLR 3126.” *Id.* The Legislature heeded the court’s advice and amended CPLR 3126 accordingly in 1978. The Judicial Memoranda explain that, pursuant to this amendment, disobedience of a court order to disclose is not necessary for the imposition of sanctions under CPLR 3126, and that noncompliance with an adversary’s discovery demands is sufficient. McKinney’s 1978 Session Laws of New York at 1909.

In 1993, the Legislature amended the section yet again, substituting the clause “this article” for “notice duly served.” This amendment only expands the scope of CPLR 3126. As the Judicial Memoranda and the Advisory Committee on Civil Practice explain, this amendment “would make it clear that a willful failure to disclose information within the meaning of section 3126 includes a willful failure to amend or supplement a response to a disclosure request as required under new subdivision (h) of section 3101.” McKinney’s 1993 Session Laws of New York at 2953, 3169. In other words, the 1993 amendment retains the force of the 1978 version of CPLR 3126, which allows for sanctions without disobedience of a court order. *See In re T/P*

Children, 629 NYS2d 677 (NY Fam. Ct. 1995) (discussing the CPLR 3126 amendments and reaching the same conclusion); *see also Turk Eximbank-Export Credit Bank of Turkey v Bickakcioglu*, 81 AD3d 494 (1st Dept 2011) (affirming unanimously Supreme Court's striking of defendant's "answer for failure to comply with discovery.").

The court now turns to the issue of whether Mr. Cherney has wilfully "fail[ed] to disclose information which the court finds ought to have been disclosed." CPLR 3126. The court first addresses Mr. Cherney's failure to produce discovery relating to the Nash/Vitapoint Loan.

Nash/Vitapoint Documents

On August 25, 2009, Mr. Cherney swore that "right up to October 2003, Gliklad had not repaid *any* principal on the \$249,750,000 I had lent to him." Mr. Cherney's August 25, 2009 Affidavit (emphasis added). In response, Mr. Gliklad submitted evidence in February 2011 purporting to show repayments totaling \$270,516,446. Ex. 28 and 29 to Affidavit of Alexander Gliklad, dated February 9, 2011. The evidence included eleven wire transfers in favor of Nash, spanning the dates of May 30, 1997 through June 28, 1999, and totaling \$171.5 million. The evidence also included a bank statement, dated October 21, 1999, reflecting a transfer of \$20 million to Nash. Lastly, Mr. Gliklad produced three letters, written by Vitapoint in 1999, directing various entities, which were allegedly indebted to Vitapoint, to transfer funds to Nash. The funds described in these letters totaled \$79,016,446.

Once Mr. Gliklad produced this evidence, documenting the entire loan's repayment, Mr. Cherney abruptly and radically changed his position. He claimed that "Cherney-controlled entities . . . had been repaid \$171.5 million, leaving an unpaid principal balance at the end of

1999 of \$78.25 million.” Mr. Cherney’s Memorandum at 17. Mr. Cherney explains his conclusion by accepting the validity of the eleven wire transfers and disputing the validity of the bank statement and the three Vitapoint letters. This tactic enables Mr. Cherney to maintain his position that Mr. Gliklad was the intended borrower on the Note. It also underscores the importance of Mr. Cherney’s production of Nash’s records relating to the Nash/Vitapoint loan.

Mr. Cherney has made statements that cast doubt on his contention that he is unable to produce the Nash/Vitapoint records requested by Mr. Gliklad. Mr. Cherney has repeatedly claimed that he “controlled” Nash. Affidavit of Michael Cherney, dated September 12, 2004 (Mr. Cherney’s September 12, 2004 Affidavit), ¶ 3; Mr. Cherney’s Memorandum at 16. He has also claimed, without proffering his personal financial records, to have “controlled and funded personally” Nash. Mr. Cherney’s August 25, 2009 Affidavit, ¶ 9. These assertions were obviously made to bolster his claim that he was not signing as the borrower on the Note. In other words, Mr. Cherney is asserting that he was in effect obtaining Mr. Gliklad’s agreement to repay the Nash/Vitapoint loan. But when asked to produce records related to this loan, Mr. Cherney claimed – in the *same* submission in which he alleged *control* of Nash – that he had no access to Nash documents because “he has never owned Nash directly, has never been a director and has never held a power of attorney for the company.” Mr. Cherney’s Memorandum at 10. In sum, Mr. Cherney alleges a relationship with Nash such that he could cause it to extend \$250,000,000 in credit, which he funded, but proffers no records of this funding and cannot obtain Nash’s books and records with respect to the credit’s repayment. Mr. Cherney’s contentions highlight, on one hand, Mr. Cherney’s goal of proving that he was not the intended

borrower on the Note and, on the other hand, his goal of excusing the absence of the Nash/Vitapoint documents that could demonstrate that Mr. Gliklad was not the intended borrower on the Note.

There are additional facts relating to the Nash documents which shed light on the lack of credibility of Mr. Cherney's position. On November 4, 2011, Mr. Cherney's attorney sent a letter to a fiduciary for Nash, Kypros Chrysostomides (Dr. Chrysostomides), asking for documents relating to Nash, "including its bank statements, wire transfer records, and/or tax returns for the years 1996-2004." Letter from Brian E. Maas to Kypros Chrysostomides, dated November 4, 2011. Dr. Chrysostomides denied the request, stating that "Mr. Cherney has never been involved as either registered shareholder or beneficial owner of Nash Investments Ltd., nor has he ever been an authorised person in connection with this company." Email from Kypros Chrysostomides to Brian E. Maas, dated November 8, 2011. Mr. Cherney asserts that this demonstrates he has no control of Nash that would be sufficient to grant him access to its documents.

However, as Mr. Cherney admits, he did have access to Nash in 2004. Indeed, this is how he obtained detailed Nash financial documents which show payments from Nash to Vitapoint and Otava. Mr. Cherney explains that in 2004, Todor Batkov (Mr. Batkov), a Bulgaria-based attorney of Mr. Cherney's, sought to "learn the precise amount of money advanced by Nash to Gliklad's companies in 1997 as part of [Mr. Batkov's] efforts to collect the debt owed by Gliklad." Affirmation of Brian E. Maas in Opposition to Motion to Compel and for Sanctions, dated December 2, 2011 (Maas Affirmation), ¶ 14. Mr. Cherney further explains

that Mr. Batkov “was collecting these documents in order to effectuate a transfer of the debt owed by Vitapoint from Nash to another company controlled by Cherney, Denise Overseas Limited” (Denise). Mr. Cherney’s Memorandum at 10 n.5. Thus, Mr. Batkov requested – and was granted – access to Nash documents from Nikita Ataullaev (Mr. Ataullaev), who held a power of attorney for Nash from 1997 to 2004.² Maas Affirmation, ¶ 14.

In sum, it is Mr. Cherney’s contention that Mr. Batkov was assisting him in collecting the debt owed by Vitapoint and also consolidating the debt in Denise. However, Mr. Batkov supposedly made no effort to accurately establish the amount of assets to be recorded on Denise’s books or the amount to be collected from Vitapoint, as he made no request for documents reflecting the loan’s repayments which, as Mr. Cherney now admits, did in fact take place as of 1999. Mr. Cherney’s Memorandum at 17. This is simply not credible. It smacks of a fabrication by Mr. Cherney to excuse noncompliance with his obligation to turn over all documents related to the Nash/Vitapoint loan.

Another incredible aspect of Mr. Cherney’s story is the fact that while he has produced carefully documented evidence of payments from Nash to Vitapoint he has failed to produce any financial documents evidencing that he funded those payments. Nor has Mr. Cherney produced any evidence showing that he was authorized to collect on the Nash/Vitapoint loan. Indeed, any documents to that effect would be in Mr. Cherney’s possession, and the ability to produce them

² On December 31, 1999, Mr. Ataullaev signed a deed confirming that Vitapoint “has fully repaid the loan extended by” Nash. Deed, dated December 31, 1999. However, Mr. Ataullaev recently claimed that he does not remember having signed the deed, and that Mr. Gliklad’s debt to Nash had not been settled during Mr. Ataullaev’s time with Nash. Declaration of Nikita Ataullaev, dated June 8, 2011.

would not depend on whether he has access to Nash documents. Further, Mr. Cherney had an obligation to furnish these documents as the court's January 31 Order or Mr. Gliklad's discovery requests encompass their production. Mr. Gliklad's Amended Notice for Discovery and Inspection, Doc. Req. Nos. 5 and 6.

In light of Mr. Cherney's contradictory statements regarding the balance due on the Nash/Vitapoint loan, his careful documentation of payments from Nash to Vitapoint and the absence of Nash records reflecting repayments on the loan, and his inability to demonstrate that he funded Nash's payments to Vitapoint or that he is authorized to personally collect on the loan, the court finds that the explanation, in his latest affidavit, of his inability to produce the Nash/Vitapoint documents to be expedient and simply not credible.

The court has given Mr. Cherney ample opportunity to produce the documents which are the subject of discovery requests made nearly three years ago. Further, after Mr. Gliklad first requested these documents in November 2009, their production has been the subject of many meet and confers over the course of this litigation, but production by Mr. Cherney has not been forthcoming. The discovery process culminated in the court's January 31 Order. Therefore, the court finds it to be a reasonable inference that Mr. Cherney's failure to furnish the above referenced Nash/Vitapoint documents is willful. See *Siegman v Rosen*, 270 AD2d 14 (1st Dept 2000) ("Generally, willfulness can be inferred when a party repeatedly fails to respond to discovery demands and/ or to comply with discovery orders, coupled with inadequate excuses for those defaults"). Accordingly, pursuant to CPLR 3126, the court finds it is "just" to strike Mr. Cherney's First Affirmative Defense and First Counterclaim.

Kuzbass Coal Documents

The court turns to the issue of Mr. Cherney's failure to produce any documents concerning his alleged "\$80 or \$110 million investment in Kuzbass [Coal]." As noted, Mr. Gliklad alleges that he relinquished his 26.37% interest in Kuzbass Coal to Mr. Cherney as consideration for the Note. In response, Mr. Cherney initially asserted that he did not need to, and did not, purchase any interest in Kuzbass Coal from Mr. Gliklad because Mr. Cherney already owned, through a joint venture, Kuzbass Coal shares which he bought for \$80 or \$110 million and later sold for \$985 million, along with several other properties in the Kuzbass region of Russia. 2002 Declaration at 5.

In its January 31 Order, the court directed Mr. Cherney to produce documents in support of his allegation that he already owned Kuzbass Coal or, alternatively, to produce an affidavit explaining why he could not do so. The court noted that without proof of Mr. Cherney's \$80 or \$110 million existing interest, his sale of the Kuzbass Coal shares would only confirm that he appears to have simply sold the shares which he acquired from Mr. Gliklad in consideration for the Note.

In the face of this, it strongly behooved Mr. Cherney to produce the documents, and he has failed to do so, choosing instead to submit an affidavit. In his affidavit he states that he never "personally owned shares in Kuzbass at any time." Mr. Cherney's March 1, 2012 Affidavit, ¶ 7. Therefore, he claims that, since the joint venture owned these shares, he cannot produce documents purporting to show his ownership in Kuzbass simply because such documents "do not exist." *Id.*

The court disagrees with Mr. Cherney's reading of the Order, which instructed Mr. Cherney to produce "[a]ll documents *related* to Cherney's investment in Kuzbass Coal. . . . This includes but is *not limited to* documents *related* to Cherney's acquisition or disposition of his interest in Kuzbass Coal." January 31 Order at 2 (emphasis added). The January 31 Order encompassed a broader category of documents, that is, any documents that would show Mr. Cherney's indirect investment in Kuzbass Coal through a joint venture.

It is difficult for the court to see Mr. Cherney's narrow interpretation of the court's January 31 Order as a good faith interpretation in light of the clear and unambiguous scope of what Mr. Gliklad has been seeking in this regard. Over the course of this litigation, Mr. Gliklad has repeatedly requested Mr. Cherney to produce evidence of his or his joint venture's ownership of shares in Kuzbass Coal. In his First Notice for Discovery and Inspection, dated November 6, 2009, Mr. Gliklad requested that Mr. Cherney produce "any documents reflecting any interest owned by Cherney or any Cherney Managed Entity" in Kuzbass Coal. Mr. Gliklad's First Notice for Discovery and Inspection, Doc. Req. No. 16. This document further defines a "Cherney Managed Entity" as "any fund or other entity whose investment activities were directed, managed or controlled, in whole or in part, by Cherney. . . ." *Id.* Mr. Cherney's joint venture surely fits within this definition. Further, in 2011, Mr. Gliklad requested from Mr. Cherney "[a]ll documents related to, underlying, and supporting the July 1, 2002, 'Declaration.'" Mr. Gliklad's Amended Notice for Discovery and Inspection, Doc. Req. No. 9. This "Declaration," which was signed by all four members of Mr. Cherney's joint venture – including Mr. Cherney himself – described the \$80 and \$30 million invested in

Kuzbass Coal. Mr. Gliklad's Amended Notice for Discovery and Inspection also requested Mr. Cherney to produce documents related to any "Cherney Managed Entity" and Imperial Bank, which, as Mr. Cherney claimed, sold a block of Kuzbass Coal shares to the joint venture. *Id.*, No. 10.

Additionally, in one of his memoranda, Mr. Cherney claimed to have "*invested* \$110 million in [Kuzbass Coal]". Memorandum of Law in Support of Defendant's Motion to Supplement Affirmative Defenses and for Summary Judgment, dated March 9, 2011 (Mr. Cherney's Summary Judgment Memorandum) at 25 (emphasis added). Presumably, Mr. Cherney interprets this statement to say that he did not personally own Kuzbass Coal shares, and that the joint venture was the actual owner.³ If so, Mr. Cherney cannot read the January 31 Order, which directed him to produce "[a]ll documents related to Cherney's *investment* in Kuzbass Coal," as merely asking for documents that show *his* personal ownership of Kuzbass Coal shares. January 31 Order at 2 (emphasis added).

Therefore, given Mr. Gliklad's requests for production, and Mr. Cherney's own words in his memoranda, Mr. Cherney's interpretation of the January 31 Order is wrong.

It is worth noting that throughout this litigation, Mr. Cherney advanced conflicting stories regarding the joint venture's acquisition of Kuzbass Coal shares. In an earlier memorandum, Mr. Cherney alleged that he funded Mr. Gliklad's purchase of a 26.37% block of Kuzbass Coal shares, at least implicitly acknowledging that Mr. Gliklad was a shareholder in

³ Indeed, any other interpretation would be inconsistent with his assertion in his latest affidavit: "I have never claimed that I personally owned shares in Kuzbass at any time." Mr. Cherney's March 1, 2012 Affidavit, ¶ 7.

Kuzbass Coal. Mr. Cherney's Summary Judgment Memorandum at 1, 5, 27. In fact, Mr. Cherney produced a July 9, 1999 deed allegedly signed by Mr. Gliklad, which allegedly shows that Mr. Gliklad owed Mr. Cherney \$13,533,849 for this transaction. Deed, dated July 7, 1999.⁴ However, Mr. Cherney later advanced a different version of his story, stating that he "is not aware that Alexander Gliklad, directly or indirectly, or any affiliates of his ever had any interests in [Kuzbass Coal], or in any entities that ultimately owned interests in [Kuzbass Coal]." Mr. Cherney's Responses to Interrogatories at 5. He further claims that "the only 26.37% block of Kuzbass Coal stock that was ever sold was auctioned . . . and the highest bidder was Sfen LLC, a company controlled by the joint venture and not owned in any way by Gliklad."⁵ Mr. Cherney's Memorandum at 23.

Mr. Cherney has failed to produce evidence supporting either one of these conflicting stories. Additionally, Mr. Cherney claimed that he "either directly or through entities owned controlled or affiliated to him would provide the Venture with financing to enable the acquisition of various investments and their financing requirements." 2002 Declaration at 2. However, he

⁴ In the deed, the borrower affirms that he owes the lender \$269,445,709. In addition, the borrower affirms a debt of \$13,533,849 to the lender "for financing the purchase of [Kuzbass Coal] shares." Mr. Cherney claims that the signatures on the deed are those of Iskander Makhmudov (Mr. Makhmudov), one of Mr. Cherney's representatives and a member of his joint venture, and Mr. Gliklad. It appears from the document that Mr. Gliklad's alleged signature was placed above the word "lender," and that Mr. Makhmudov's alleged signature was placed above the word "borrower." Further, the words "lender" and "borrower" were crossed out and interchanged. In explaining this handwritten alteration, Mr. Cherney argues that Mr. Gliklad fraudulently signed as the lender, and that Mr. Makhmudov "caught this error and corrected it." Mr. Cherney's Summary Judgment Memorandum at 10. Mr. Gliklad has denied these allegations. Plaintiff's Reply to Defendant's Revised Affirmative Defenses and Counterclaims, dated December 1, 2009, ¶ 9.

⁵ In other words, Mr. Cherney first claimed that Mr. Gliklad was the owner of the 26.37% block, and that Mr. Cherney only provided the purchase price. Now, however, Mr. Cherney contends that he did not know of Mr. Gliklad's involvement with Kuzbass Coal, and that Mr. Cherney's joint venture was the owner of the block.

failed to produce evidence of this direct or indirect "financing" of the joint venture. Despite these failures, the court is reluctant to strike Mr. Cherney's Ninth Affirmative Defense, a drastic sanction which would preclude Mr. Cherney from arguing a lack of consideration on the Note.

Mr. Cherney argues that he should be allowed to take discovery from non parties located in Cyprus, The Bahamas, Switzerland and possibly other jurisdictions. The court is equally reluctant to allow Mr. Cherney to go down this path. Rather, the court orders Mr. Cherney to make himself available for a deposition (at a location to be agreed upon or, in the absence of an agreement, at a location ordered by the court) to answer relevant questions relating to Mr. Cherney's contentions as to where any documents related to Kuzbass Coal are located and why they are not within his possession or control. The court will review the transcript of Mr. Cherney's deposition and decide whether it is appropriate to strike Mr. Cherney's Ninth Affirmative Defense.

Accordingly, it is

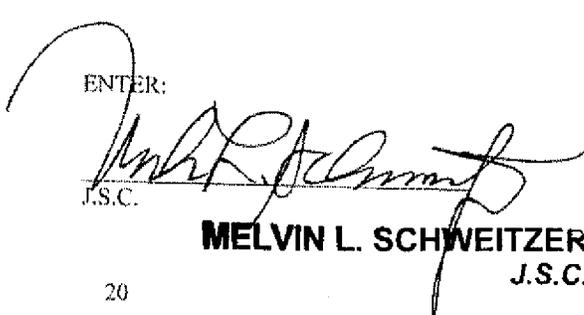
ORDERED that the court grants Mr. Gliklad's motion to strike Mr. Cherney's First Counterclaim and First Affirmative Defense; and it is further

ORDERED that the court denies Mr. Gliklad's motion to strike Mr. Cherney's Ninth Affirmative Defense.

Dated: July 19, 2012

ENTER:

J.S.C.


MELVIN L. SCHWEITZER
J.S.C.