

**Barneli & Cie SA v Dutch Book Fund SPC, Ltd.**

2012 NY Slip Op 33379(U)

February 10, 2012

Supreme Court, New York County

Docket Number: 600871/08

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 600871/2008

**BARNELI & CIE SA**

vs.

**DUTCH BOOK FUND SPC, LTD.**

SEQUENCE NUMBER : 006

ORDER OF PROTECTION

PART 3

INDEX NO. 600871/08

MOTION DATE 5/24/11

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were submitted in this motion to/for compel

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

\_\_\_\_\_ IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 2-10-12 Eileen Branstetter

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

EILEEN BRANSTEN

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

-----X  
BARNELI & CIE SA,

Plaintiff,

-against-

Index No. 600871/08  
Motion Date: 6/21/11  
Motion Seq. Nos.: 005, 006

DUTCH BOOK FUND SPC, LTD,  
DUTCH BOOK PARTNERS, LLC and  
STANLEY R. JONAS,

Defendants.

-----X

BRANSTEN, J.

Motion sequence numbers 005 and 006 are consolidated for disposition. In motion sequence number 005, Plaintiff Barneli & Cie SA (“Barneli”) moves to compel the production of documents pursuant to CPLR 3124. In motion sequence number 006, Barneli moves for a protective order striking Defendants Dutch Book Fund SPC, Ltd.’s (the “Fund”), Dutch Book Partners LLC’s (“Partners”) and Stanley R. Jonas’s<sup>1</sup> (“Jonas”) (collectively, “Defendants”) Amended Fourth Notice to Admit (the “Notice”).

**I. Background**

The parties are fully familiar with the facts of this matter, and, therefore, the facts are only referred to as necessary to decide the instant motion. For a full discussion of the facts, see this court’s decision in *Barneli & Cie S.A., v. Dutch Book Funds, SPC, Ltd.*, 28 Misc. 3d 1232A (NY Sup. Ct. 2010).

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<sup>1</sup> The Fund and Partners opposed Barneli’s motion together and Jonas opposed the motion separately. The two sets of opposition papers, however, are identical. The court will therefore only refer to the Fund and Partners’ set of opposition papers.

## II. Motion to Compel

### A. *Standard of Law*

CPLR 3124 states that a party seeking disclosure may move to compel compliance “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article.” *Id.* A party is entitled to full disclosure of all evidence “material and necessary in the prosecution or defense of an action.” CPLR § 3101 (a). CPLR § 3101 is to be liberally construed to require disclosure where the discovery sought will assist in trial preparation by sharpening the issues. *Kavanagh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952, 954 (1998). The “test is one of usefulness and reason.” *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968). “The burden of showing that disclosure is improper is upon the party asserting it.” *Roman Catholic Church of Good Shepherd v. Tempco Systems*, 202 A.D.2d 257, 258 (1st Dep’t 1994).

### B. *Barneli’s Document Requests No. 6*

Plaintiff’s sixth document request seeks “[a]ll documents relating to how and in what manner Partners created or attempted to create a ‘Dutch Book’ in the Portfolio.”<sup>2</sup> Jaqueline I. Meyer’s Affidavit in Support of Plaintiff’s Motion to Compel Production of Documents (“Meyer Aff., Mot. to Compel”), Ex. C, p. 5.

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<sup>2</sup> Dutch Book’s Information Memorandum describes a “Dutch Book” as “a set of positions ‘betting’ on a particular action that, in sum, earns a positive return for the owner of the ‘Dutch Book’ regardless of the outcome.” Jaqueline I. Meyer’s Reply Affidavit in Further Support of Plaintiff’s Motion to Compel Production of Documents (“Meyer Reply Aff., Mot to Compel”), Ex. G, p. 8.

Plaintiff claims that its sixth request is relevant to its cause of action for fraud. Plaintiff's fraud claim consists of allegations that Defendants induced Plaintiff to invest in the Fund by falsely representing that they intended to create a "Dutch Book" using proprietary algorithms that Defendants had successfully used in the past. Meyer Aff., Mot. to Compel, ¶ 9. Plaintiff asserts that Defendants never created and never intended to create a Dutch Book using proprietary algorithms because Defendants never had any such algorithms. Amended Complaint ("Am. Coml."), ¶¶ 12-16. Finally, Plaintiff alleges that Defendants knew that they could not structure the Portfolio as a Dutch Book when they promised Plaintiff that they could do so. *Id.* at ¶ 14.

Defendants assert that Plaintiff's discovery request is "not relevant to [Plaintiff's] remaining [fraud and alter ego] claims." Meyer Aff., Mot. to Compel, Ex. D, ¶ 6. Defendants argue that Plaintiff's fraud claim is limited to the question of whether Defendants falsely represented that they had proprietary algorithms when they allegedly solicited Plaintiff's investment in the Fund. Defendants Dutch Book Fund SPC, Ltd.'s and Dutch Book Partners, LLC's Memorandum of Law in Opposition to Plaintiff's Application for an Order Compelling Production of Certain Documents ("Dutch Book's Memo in Opp. to Mot. to Compel"), p. 4. Thus, Defendants claim, Plaintiff's allegations that Defendants never intended to carry out their promise to create a Dutch Book are not properly part of Plaintiff's cause of action for fraud. *Id.* Defendants reason that documents created subsequent to Plaintiff's investment in the Fund are irrelevant and not subject to discovery. *Id.*

Defendants base their argument on *Financial Structures Ltd. v. UBS AG*, 77 A.D.3d 417 (1st Dep't 2010). In *Financial Structures*, the First Department states that “a misrepresentation of future intent rather than a misrepresentation of present fact . . . is not sustainable as a cause of action separate from breach of contract.” *Financial Structures Ltd.*, 77 A.D.3d at 419. However, *Financial Structures* is inapplicable. In this case, Plaintiff does not merely allege that Defendants misrepresented their future intent for managing the fund. Rather, Plaintiff argues that when Defendants promised that they would use proprietary algorithms to structure the Fund as a Dutch Book, they knew they could not possibly realize their promise. “[A] promise made with a preconceived and undisclosed intention of not performing it, constitutes a misrepresentation.” *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 956 (1986). Plaintiff’s fraud claim does not involve “a mere promissory statement as to what will be done in the future. It allege[s] rather a representation of present fact, not of future intent collateral to, but which [is] the inducement for the contract.” *Id.* Plaintiff’s sixth document request therefore properly seeks information relevant to Plaintiff’s fraud claim.

Documents describing if and how Defendants attempted to create the “Dutch Book” trading strategy may provide evidence as to whether Defendants had “a preconceived and undisclosed intention” not to perform their alleged promise to create the Dutch Book. *Id.* Consequently, under New York’s liberal discovery rules, Plaintiff is entitled to the documents sought in Document Request 6.

***C. Barneli's Document Request No. 12***

Plaintiff's twelfth document request seeks "[a]ll documents relating to the offer of shares to any investor or potential investor other than [Plaintiff]." Meyer Aff., Mot. to Compel, Ex. C, p. 6. Defendants interpreted this request as pertaining to actual, not just potential, investors in the fund other than Plaintiff. Dutch Book's Memo in Opp. to Mot. to Compel, p. 4. Plaintiff, however, admitted in the Complaint that it was the Fund's sole investor. Amended Complaint ("Am. Compl."), ¶ 7. Defendant, therefore, need not produce documents showing that the Fund had investors other than Plaintiff.<sup>3</sup>

Defendants raise the same objections to producing the documents requested in Document Request 12 as it did to Document Request 6. Dutch Book's Memo in Opp. to Mot. to Compel, p. 6; *see* § I. B. *supra*. That argument is similarly unavailing here. Information concerning offers to other potential investors is relevant to Plaintiff's fraud claim. Proof that Defendants made no mention of the Dutch Book algorithms to other potential investors could support Plaintiff's claim that Defendants had no such algorithms, and that Defendants invented the Dutch Book scheme specifically to induce Plaintiffs to invest in the fund. Plaintiff is therefore entitled to the discovery sought in Document Request 12.

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<sup>3</sup> Plaintiff claims that Defendants denied that Plaintiff was the sole investor of the Fund in its Answer. Plaintiff's Reply Memorandum of Law in Further Support of its Motion to Compel Production of Documents ("Plaintiff's Reply Memo for Mot. To Compel"), p. 4. Defendants actually denied having "knowledge or information [sufficient] to form a belief" as to that fact. Answer, ¶ 6.

***D. Barneli's Document Request Nos. 13 and 19***

Plaintiff's thirteenth document request seeks "[a]ll documents relating the determination of the net asset value of the Fund and/or the Portfolio, including the determination of [Plaintiff's] share of that net asset value." Meyer Aff., Mot. to Compel, Ex. C, p. 6. Plaintiff's nineteenth Document Request seeks "[a]ll documents relating to, reflecting, or evidencing transactions engaged in, and investments made by the Portfolio." *Id.* at 7.

Plaintiff asserts that the information it seeks could support its contention that Defendants never intended to structure the Portfolio as a Dutch Book. Meyer Aff., Mot. to Compel, pp. 6 and 7-8. In opposing production of these documents, Defendants raise the same argument concerning the scope of Plaintiff's fraud cause of action that it raised as to document requests 6 and 12. Dutch Book's Memo in Opp. to Mot. to Compel, pp. 7 and 12. *See* §§ I. B. and C., *supra*. Again, this argument fails because the information Plaintiff seeks is relevant to proving its cause of action for fraud.

Defendants further assert that the requested documents are not relevant to Plaintiff's alter ego claim or to the determination of Plaintiff's damages. *Id.* at 7. The court has considered these arguments and finds them unconvincing. Plaintiff's motion to compel the production of the documents sought in document requests 13 and 19 is therefore granted.

***D. Barneli's Document Requests Nos. 14 and 15***

Plaintiff's fourteenth document request seeks "[a]ll year and/or interim audited and unaudited financial statements of the Portfolio including, without limitation, profit and loss statements, balance sheets, projections and forecasts." Meyer Aff., Mot. to Compel, Ex. C, p. 6. Plaintiff's fifteenth document request seeks "[a]ll documents relating to bank accounts maintained by, or on behalf of the Fund and/or the Portfolio, including but not limited to bank statements, deposit slips, cancelled checks and wire transfers." *Id.*

Plaintiff asserts that these requests "bear directly on plaintiff's claim that Jonas was the alter ego of Partners." Plaintiff's Reply Memo for Mot. to Compel, p. 6. Plaintiff alleges that Jonas was a director of the Fund. *Id.* The Fund retained Partners, whose CEO and CFO was Jonas, as an investment advisor for the Portfolio. *Id.* Defendant contends that neither request relates to Plaintiff's alter ego claim because Plaintiff seeks only financial information regarding the Fund and the Portfolio. Dutch Book's Memo in Opp. to Mot. to Compel, p. 10. Plaintiff, however, claims Jonas is the alter ego of Partners, not the Fund. Am. Compl., ¶ 43.

The materials sought in Document Requests 14 and 15 could show whether Jonas abused his role as CEO and CFO of Partners, which granted him access to and a measure of control over the Fund's and the Portfolio's assets. The request is thus relevant to Plaintiff's alter ego claim. Plaintiff's motion to compel the production of the documents sought in Document Requests 14 and 15 is therefore granted.

## II. Motion for a Protective Order

### *A. Standard of Law*

CPLR § 3123 permits service of a request for admission of “the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.” Requests for admissions are not a substitute for other disclosure devices, they are instead “designed to remove from the case those uncontested matters which would merely present a time-consuming burden at trial.” *Villa v. New York City Housing Authority*, 107 A.D.2d 619, 620 (1st Dep’t 1985). “Thus, a notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts, which can only be resolved after a full trial.” *Taylor v. Blair*, 116 A.D.2d 204, 206 (1st Dep’t 1986).

Courts may strike a request to admit if it predominately contains improper questions. *Berg v. Flower Fifth Ave. Hospital*, 102 A.D.2d 760, 761 (1st Dep’t 1984). Even if some items in a request to admit are proper, “it is not the court’s obligation to prune” requests to admit, and, therefore, the court may strike the request in its entirety. *Kimmel v. Paul, Weiss, Rifkind, Wharton & Garrison*, 214 A.D.2d 453 (1st Dep’t 1995).

Defendant argues that Plaintiff admitted a number of items in the Notice by default because Plaintiff failed to provide a sworn statement denying or admitting those items as required by CPLR § 3123 (a). Defendant Dutch Book Fund SPC, Ltd.’s and

Dutch Book Partners, LLC's Memorandum of Law in Opposition to Plaintiff's Application for a Protective Order Vacating Defendant's Amended Fourth Notice to Admit, p. 2. However, parties need not provide such a statement if they timely seek a protective order to strike the request to admit in its entirety. *Berg*, 102 A.D.2d at 761. Plaintiff has done so here, and, thus, it has made no admissions by default.

Defendants alternatively argue that the Notice to Admit seeks only undisputed facts as permitted by CPLR § 3123; however, the vast majority of Defendants' requests for admission are improper. Defendants seek the admission of facts about non-parties that are not reasonably within Plaintiff's knowledge. Defendants also request admissions as to legal conclusions. A number of Defendants' requests are ambiguous and based on undefined terms or unprovided documents. Finally, many of Defendants' requests are complicated compound statements, some of which are phrased in confusing and, at times, unintelligible language.

Item 12 in Defendants' Amended Fourth Notice to Admit (the "Notice") exemplifies the defects that plague many of Defendants' requests. Item 12 seeks an admission that "Mr. Cugny [a non-party to the action] was aware that a Panamanian Trust could not qualify under Cayman Island Law, or the terms of the Subscription Instructions as an 'Eligible Investor' pursuant to the definition of such on page vii of the Memorandum." Jaqueline I. Meyer's Affidavit in Support of Plaintiff's Motion for a Protective Order ("Meyer Aff. for Protective Order"), Ex. C, p. 2. This request asks

Plaintiff to admit a non-party's state of mind at an unspecified time as to a legal conclusion. Furthermore, Defendants did not define the term "Subscription Instructions" or provide Plaintiff with the document to which that term refers. Overall, the request is lengthy, overly-complicated and confusing. This example typifies the requests made throughout the Notice.

Defendants did not limit their Notice to facts that they reasonably believe are not in dispute. Instead, Defendants "seek admissions with respect to a wide range of information that is clearly beyond the scope of a notice to admit as a disclosure device." *Berg* 102 A.D.2d at 160. Defendant's Notice is similar to "a deposition on written questions which, in this case, would permit plaintiffs the benefit of an examination before trial conducted solely by leading questions." *Id.* The Notice is accordingly stricken in its entirety.

*The court's order follows on the next page.*

**III. Conclusion**

It is hereby

ORDERED that Plaintiff's motion to compel the production of documents requested in document request six, document request twelve, document request thirteen, document request fourteen, document request fifteen and document request nineteen is granted; and it is further

ORDERED that Plaintiff's motion for a protective order striking Defendants' Amended Fourth Notice to Admit in its entirety is granted.

Dated: New York, New York  
February 10, 2012

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.