

<b>Shah v Ortiz</b>
2014 NY Slip Op 30059(U)
January 9, 2014
Supreme Court, New York County
Docket Number: 651500/2011
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. Eileen Bransten, Justice **PART 3**

-----X  
SAMAR SHAH and INDIGO GLOBAL, INC.,

Plaintiffs,

-against-

Index No.: 651500/2011  
Motion Date: 1/7/2014  
Motion Seq. No.: 005

JUAN ORTIZ, A-DATA TECHNOLOGY LATIN  
AMERICA, LLC and FAR EAST INVESTMENTS,  
LLC,

Defendants.  
-----X

The following papers, numbered 1 to 4, were read on this motion to amend.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) 1

Answering Affidavits - Exhibits No(s) 2

Replying Affidavits No(s) 3,4

Cross-Motion:  Yes  No

Motion sequence 005 is decided in accordance with the  
accompanying memorandum decision.

Dated: January 9, 2014

  
Hon. Eileen Bransten

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
  - 2. CHECK AS APPROPRIATE: Motion Is:  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

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

-----X  
SAMAR SHAH and INDIGO GLOBAL, INC.,

Plaintiffs,

-against-

Index No. 651500/2011  
Motion Date: 1/7/2014  
Motion Seq. No.: 005

JUAN ORTIZ, A-DATA TECHNOLOGY LATIN  
AMERICA, LLC and FAR EAST INVESTMENTS,  
LLC,

Defendants.

-----X

**BRANSTEN, J.**

This matter comes before the Court on Defendants/Counterclaim-Plaintiffs' Juan Ortiz and Far East Investments, LLC's ("Far East") (collectively "Counterclaimants") motion for leave to file a Verified Second Amended Answer to Complaint and Counterclaims. Plaintiffs/Counterclaim-Defendants Samar Shah ("Shah") and Indigo Global, Inc. ("Indigo") cross-move for leave to file a Verified Amended Complaint. Both the motion and the cross-motion are opposed.

**I. Background**

The facts of this matter, particularly the arbitration proceeding referenced below, were discussed extensively in the Court's July 2012 decision denying Defendants' summary judgment motion and in the Court's recent decision granting Counterclaimants' motion to compel (motion sequence 003).

## II. Counterclaimants' Motion to Amend Their Answer and Counterclaims

Counterclaimants seek to amend their Verified Amended Answer to Complaint and Counterclaims to: (1) assert a claim for negligent misrepresentation; (2) add additional allegations to “amplify” their counterclaims; and, (3) replead their previously-dismissed counterclaims for tortious interference with contract and tortious interference with prospective economic advantage. Since Counterclaimants provide no argument in their briefing to support their final request to replead their tortious interference claims, this portion of their motion to amend is denied. The Court will address their remaining requests below.

### A. *Motion to Amend Standard*

Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party. See CPLR 3025(b); *see also Solomon Holding Corp. v. Golia*, 55 A.D.3d 507, 507 (1st Dep't 2008) (granting motion to amend absent showing of surprise or prejudice). A showing of “[p]rejudice requires ‘some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.’” *Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dep't 2007) (quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981)).

B. *Negligent Misrepresentation*

Counterclaimants first propose to add a negligent misrepresentation counterclaim against Plaintiff Samar Shah, stemming from Shah's purported misrepresentation in a November 21, 2008 letter that he would appear and testify in the arbitration proceeding between A-Data Technology Latin America, LLC and A-Data Technology Co., Ltd.. The central allegation in the proposed counterclaim is that "[t]he information imparted by Shah to Ortiz in connection with the November 2008 Letter ... was incorrect." (Proposed Second Am. Counterclaim ¶ 158.) Further, Counterclaimants allege that Shah and Ortiz were in privity, since they "were the parties to the November 2008 Letter," and the agreement memorialized therein. *See* Counterclaimants' Moving Br. at 5.

Shah and Indigo attempt to cast this proposed claim as duplicative of Counterclaimants' breach of fiduciary duty and breach of the duty of good faith and fair dealing claims. However, the proposed negligent misrepresentation cause of action challenges different conduct than the other two claims. The negligent misrepresentation claim centers on the November 2008 letter and Shah's representations therein regarding the arbitration. Conversely, the breach of fiduciary duty and breach of the covenant of good faith and fair dealing claims attack the termination of the joint venture. Accordingly, the claims assert different factual bases for recovery, arise from different agreements, and therefore are not duplicative. *See Mill Fin., LLC v. Gillett*, 41 Misc.3d

1206(A), at \*6 (Sup. Ct. N.Y. Cnty. 2013) (“Two claims are only duplicative when they arise from the same facts and seek identical damages.”); *Cf. Netologic, Inc. v. Goldman Sachs Grp., Inc.*, 110 A.D.3d 433, 433 (1st Dep’t 2013) (finding breach of the covenant of good faith and fair dealing claim duplicative of breach of contract claim where “both claims arise from the same facts and seek the identical damages for each alleged breach.”) Accordingly, Counterclaimants’ motion to amend is granted.

C. *Additional Allegations*

Counterclaimants also seek leave to add additional allegations to “amplify” the assertions supporting their claims. This request strikes the Court as unnecessary; however, the Court is mindful that leave to amend is to be freely granted. Shah and Ortiz offer no arguments in opposition to these amendments. Therefore, Counterclaimants’ motion is granted.

III. **Shah and Ortiz’s Cross-Motion for Leave to File a Verified Amended Complaint**

Shah and Ortiz cross-move for leave to file an amended complaint. This proposed amendment does not include new claims; instead, like Counterclaimants, Shah and Ortiz

“merely add[] more detail based upon documentation not previously seen or information provided [sic].” See Affirmation of Edward Weissman in Support of Cross-Motion ¶ 7.<sup>1</sup>

Plaintiffs add allegations that they are entitled to fifty percent of the arbitration award. While Counterclaimants dispute the validity of this claim, the Court cannot pass on the merits of Plaintiffs’ allegations at this juncture. See *Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 A.D.3d 363, 366 (1st Dep’t 2007) (in considering a proposed amendment, “the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face.”) In addition, any assessment of the factual sufficiency of Plaintiffs’ allegations likely should await the close of discovery and the filing of summary judgment. *Id.* (“Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment.”) Thus, Plaintiffs may amend their complaint to add these allegations.

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<sup>1</sup> While the Court references the arguments made by Plaintiff’s counsel in his affirmation, the Court does not sanction counsel’s improper inclusion of argument in his affirmation. As counsel is no doubt aware, argument is to be presented in a memorandum of law. The affirmation is not an extension of the memorandum of law or a place to submit additional argument. See, e.g., *Tripp & Co. v. Bank of New York, Inc.*, 28 Misc.3d 1211(A) at \*6 (Sup. Ct. N.Y. Cnty. 2010) (“Affirmations, like affidavits, are reserved for a statement of the relevant facts; a statement of the relevant law and arguments belongs in a brief (i.e., a memorandum of law).”) (citing 22 NYCRR § 202.8(c)). Counsel is directed to refrain from the submission of argumentative affirmations in the future.

Likewise, Plaintiffs' request to add the proposed allegations regarding the Shapiro Ramos law firm is granted. While this request again strikes the Court as unnecessary, leave to amend pleadings is to be freely granted. However, the Court notes for the benefit of the parties that these allegations do nothing to revive Plaintiffs' motion to disqualify attorney Shapiro. On July 22, 2013, this Court denied Plaintiffs' motion for disqualification, and on December 24, 2013, the First Department affirmed that ruling. Nothing in the new allegations provides a basis for this Court to reconsider its ruling or to make a new ruling that Shapiro is disqualified under either Rule 1.9 and 3.7 of the Rules of Professional Conduct.

*(Order follows on next page.)*

**IV. Conclusion**

Accordingly, it is

ORDERED that Counterclaimants' motion for leave to amend their Verified Amended Answer to Complaint and Counterclaims is granted as to their negligent misrepresentation claim and additional allegations, and denied as to their proposed tortious interference with contract and tortious interference with prospective economic advantage claims, and the Verified Second Amended Answer to Complaint and Counterclaims 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 Plaintiffs/Counterclaim-Defendants shall serve a reply to counterclaims or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that Plaintiffs' motion to amend their Complaint is granted, and the Verified 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 Verified Amended Complaint or otherwise respond thereto within 20 days from the date of said service.

Dated: New York, New York  
January 9, 2014

ENTER



Hon. Eileen Bransten, J.S.C.