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

----------X

INTERNATIONAL NUT ALLIANCE, LLC, EUGENE J. SOBECK, and ANN MARIE SOBECK,

Plaintiffs,

- against -

BANK LEUMI USA,

Defendant.

----------X

Index No. 650149/2016
Motion Date: 5/4/2016
Motion Seq. No. 001

BRANSTEN, J.:

This case involves a defaulted loan, coupled with allegations that the lender hindered repayment. The matter now comes before the Court on Defendant Bank Leumi USA's (the "Bank") motion to dismiss the complaint, pursuant to CPLR 3211(a) (1) and (7). In the alternative, the Bank seeks to stay this action pending the resolution of another action, pursuant to CPLR § 2201. For the reasons that follow, the Bank's motion to dismiss is granted in part and denied in part. In addition, as stated on the April 28, 2016 record, the Bank's motion to stay is denied. *See* 4/28/16 Tr. at 3:25-4:5.

I. **Background**[1]

Plaintiff International Nut Alliance, LLC ("INA") buys fruits and nuts, imports them to North America, and sells them to roasting and processing companies. Plaintiff Eugene J. Sobeck is INA's president, and Plaintiff Ann Marie Sobeck is his wife.

A. *INA's Agreements with the Bank*

In February 2008, the Bank began providing INA with credit pursuant to a line of credit agreement, a promissory note, and a security agreement. In turn, Eugene Sobeck guaranteed INA's obligations to the Bank. The line of credit agreement and the promissory note were periodically renewed and extended.

In 2010, crop failures and political unrest in Africa caused suppliers to fail to deliver their products to INA and other industry buyers. INA managed to resolve some problems with customers and obtain additional business. As a result, INA informed the Bank that sales increased substantially in 2013 and that it needed an increase to the credit facility. Allegedly, the Bank assured INA and Eugene Sobeck that it would finance the additional business and asked INA to advise it "of additional opportunities to add customers in the import community to increase the bank's customers." (Compl. ¶ 11.)

---

[1] The facts described in this section are drawn from the Complaint unless otherwise stated.

Based on the Bank's assurances, INA made purchases to support its significant increase in business, and the Bank "increased the line of credit." *Id.*

In January 2014, Ann Marie Sobeck signed a limited guaranty, guaranteeing a $2.7 million payment that INA then owed to the Bank. Around the same time, the Sobecks mortgaged jointly-owned property in favor of the Bank. The mortgage states that it secures the "payment and performance," under Eugene Sobeck's guaranty and Ann Marie's guaranty, as well as all sums INA owes or will owe to the mortgagee in the future. The mortgage states that a default under the promissory note shall be a default under the mortgage.

Upon the expiration date of a November 2013 note, INA executed a February 2014 note and subsequently a June 2014 note. When the June 2014 note expired in October 2014, INA was unable to repay it. In July 2014, Eugene Sobeck mortgaged property belonging to him alone to secure the payment and performance of the November 2013 note under his guaranty. The mortgage states that a default under the promissory note shall be a default under the mortgage.

The Sobecks allege that they agreed to grant the mortgages because the Bank assured them that it would open up the credit line and begin making advances again to INA. They further allege that the Bank also threatened to liquidate INA if the Sobecks

did not grant the mortgages, and that the Bank did not keep its promise to continue providing credit.

B. *The Bank's Relationship with INA After December 2014*

Against this backdrop, in December 2014, the Bank entered into a Deferred Prosecution Agreement and paid a $400 million penalty following Justice Department-led tax fraud investigation. This caused the Bank to downsize its operations in a "'cut and run' strategy" and to cut "mid market accounts," such as INA's account. (Compl.¶ 13.) "Ultimately, Bank Leumi pulled its credit facilities, despite its promise to continue lending to INA and INA's reliance" on the promise. *Id.* INA was left with no financing and had to cancel orders and could not fulfill contracts. In addition, INA was unable to negotiate with suppliers and could not pay for overseas inventory or collect payment from customers. The Bank allegedly depleted INA's cash flow by "constantly" calling the loans in default. *Id.* ¶ 16. Nevertheless, INA made payments, reducing its debt to the Bank from $3 million to $2.18 million.

The Complaint alleges that the Bank received several proposals from other banks that desired to refinance INA and refused each one. The Complaint also alleges that INA currently has $2.3 million in outstanding accounts receivables. Instead of enabling INA to collect those debts, the Bank rejected each collection proposal put forward by

Plaintiffs. The Bank sent letters to INA's customers telling them not to pay INA but to send the money to the Bank. Since that time, customers purportedly have stopped paying INA almost entirely and likewise do not pay the Bank.

C. *The Forbearance Agreement*

In January 2015, INA and the Bank entered into the Forbearance, Modification and Extension Agreement (the "Forbearance Agreement"), which extended the maturity date of the June 2014 note to the end of June 2015. The Forbearance Agreement recites that the June 2014 note is secured by two mortgages, as well as by the security interests described in the security agreement of February 2008. In addition, the Forbearance Agreement states that Eugene Sobeck guarantees repayment of the June 2014 note. Nevertheless, INA did not make all the required payments under the Forbearance Agreement.

D. *Procedural History*

On September 10, 2015, the Bank commenced an action in this Court against INA and the Sobecks based on the June 2014 note, captioned *Bank Leumi USA v. International Nut Alliance, LLC, Eugene J. Sobeck, and Anna Marie Sobeck*, Index No. 653701/2015 (the "2015 action"). INA and the Sobecks answered and presented affirmative defenses.

The Bank then moved for summary judgment and later withdrew the motion for reasons not touching on the merits.

The Sobecks and INA then brought the instant action, which the Bank now seeks to dismiss. In this action, Plaintiffs assert ten causes of action, listed by Plaintiffs as: (1) intentional interference with contractual relationship; (2) intentional interference with prospective economic advantage; (3) malicious interference with contractual relationship; (4) malicious interference with prospective economic advantage; (5) promise causing detrimental reliance; (6) promissory estoppel; (7) reliance on another's conduct; (8) business intentionally interfered with by an outsider; (9) breach of the implied covenant of good faith and fair dealing; and, (10) Equal Credit Opportunity Act.

II. **Discussion**

The Bank now seeks dismissal of the Complaint in its entirety for failure to state a cause of action and based on documentary evidence.[2]

[2] While the Bank also sought dismissal on CPLR 3211(a)(4) grounds, that motion has been mooted by the parties' filing of a stipulation consolidating this action with the previous filed case, *see* NYSCEF No. 38.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The Court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)).

Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *First, Third, and Eighth Claims for Tortious Interference with Contract*

To adequately plead a cause of action for the tort of inducing the breach of an existing contract or tortious interference with existing contractual relations, Plaintiffs must allege that the Bank knew that Plaintiffs had a contract with a third party, that the Bank intentionally induced the third party to breach the contract or otherwise rendered performance impossible, and that the breach caused injury to Plaintiffs. *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993). Moreover, Plaintiffs must identify the term or terms of the agreements that were breached. *See Williams v. Citigroup, Inc.*, 104 A.D.3d 521, 522 (1st Dep't 2013).

1. Identification of the Contracts and Contractual Terms Breached

The Complaint fails to identify both those contracts purportedly breached and the third-parties with whom it entered into those contracts. To remedy this deficiency, Plaintiff Eugene Soback submits an affidavit in opposition to the motion that identifies certain of the third parties as "including but not limited to, Zaloom Marketing

Corporation, Rockland Wholesale, and ConAgra." (Affidavit of Eugene Soback ¶ 2.) However, this averment does not identify the term or terms of the agreements breached and therefore it fails to salvage Plaintiffs' tortious interference with contract claims.

2. Economic Justification

Moreover, for the interference to be deemed tortious, the Bank must have acted without justification and its action must not have been incidental to a lawful purpose. *Alvord & Swift v. Muller Constr. Co.*, 46 N.Y.2d 276, 281-282 (1978). Where a defendant procures the breach of a contract in the exercise of an equal or superior right, it is acting with just cause or excuse and has justification for what would perhaps otherwise be an actionable wrong. *Torrenzano Group, LLC v. Burnham*, 26 A.D.3d 242, 243 (1st Dep't 2006).

The Complaint alleges that INA's customers owe it enough money to repay the loans. "Instead of cooperating in the collection of those receivables, Bank Leumi's actions (sending out letters to vendors, summarily dismissing each collection proposal, bleeding out cash from the company) have made it virtually impossible, however, to complete such task." (Compl. ¶ 24.)

As an example of the bank's interference, the Complaint attaches a letter from the Bank to an INA customer. The letter states that the customer owes an account to INA,

that this account is collateral under a February 29, 2008 security agreement between the Bank and INA, that INA assigned the account to the Bank and that, pursuant to the security agreement, the customer must pay the account to the Bank. The letter advises that, under section 9-406(a) of the New York Uniform Commercial Code, the customer may only discharge its obligation on the account by paying the Bank and that paying INA will not discharge the obligation. Plaintiffs allege that the Bank sent such correspondence to several customers, causing them to stop doing business with INA and not to pay INA. The Bank counters that its conduct was legally justified.

The security agreement between INA and the Bank provides that INA assigns the security to the Bank, that the security includes accounts and payment intangibles, and that the Bank may demand payment from account debtors. "Under N.Y. U.C.C. § 9-607(a)(3), a secured party may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor . . . to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral." *ImagePoint, Inc. v. JPMorgan Chase Bank, N.A.*, 27 F. Supp. 3d 494, 503 (S.D.N.Y. 2014); *see also Community Bank v. Newmark & Lewis, Inc.*, 534 F. Supp. 456, 460 (E.D.N.Y. 1982); *General Motors Acceptance Corp. v. Clifton-Fine Cent. School Dist.*, 85 N.Y.2d 232, 236, 237 (1995).

INA's customers are the account debtors, the accounts receivables are the collateral, INA is the debtor, and the Bank is the secured party. The UCC and the security agreement show that the Bank had the right to attempt to enforce INA's obligations with respect to the accounts that the customers owed INA. Such conduct is deemed commercially reasonable. *See Chase Manhattan Bank, N.A. v. Our Own Farm,* 237 A.D.2d 222, 223 (1st Dep't 1997).

The Bank's defense to the claim of tortious interference with third parties is also a defense to any claim that the Bank improperly interfered with INA's performance of INA's own contracts. Legal justification is a defense to the claim of unlawful interference with a party's performance of its own contract with a third party. *See Morris v. Blume,* 55 N.Y.S.2d 196, 199 (Sup. Ct. N.Y. Cnty. 1945), *aff'd* 269 App. Div. 832 (1st Dep't 1945).

The opposition to the motion correctly states that the Bank's motion fails to reference any agreement supporting its alleged right to write to the account debtors. The security agreement was not included with the Bank's initial motion papers, and instead was submitted by the Bank on reply. Accordingly, Plaintiffs were unable to address it in their opposition. Therefore, this ground cannot provide a basis for dismissal of the claim on this motion.

C. *Second and Fourth Claims – Tortious Interference with Prospective Economic Advantage*

Where the alleged interference is with prospective, as opposed to existing, contractual rights, the plaintiff must show improper or wrongful conduct by the defendant. *NBT Bancorp v. Fleet/Norstar Fin. Group,* 87 N.Y.2d 614, 621 (1996). Tortious interference with prospective economic relations requires an allegation that the plaintiff would have entered into an economic relationship with a third party but for the defendant's wrongful conduct, or that defendant interfered for the sole purpose of harming the plaintiff. *Snyder v. Sony Music Ent.*, 252 A.D.2d 294, 300 (1st Dep't 1999); *Schwartz v. Soc'y of N.Y. Hosp.,* 199 A.D.2d 129, 131 (1st Dep't 1993). Wrongful conduct means physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, not mere persuasion. *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980). Where such a claim fails to allege that defendant's conduct was "motivated solely by malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations," it must be dismissed. *Prestige Foods v. Whale Sec. Co.,* 243 A.D.2d 281, 282 (1st Dep't 1997) (quoting *Matter of Ent. Partners Group v. Davis,* 198 A.D.2d 63, 64 (1st Dep't 1993)).

While Plaintiffs assert that the Bank's interference prevented INA from obtaining more business, they fail to allege wrongful conduct. Plaintiffs' conclusory statement that

the Bank made negative comments about INA to other businesses is not sufficient to allege that the Bank acted wrongly under the law or that the Bank's actions were malicious or designed to harm Plaintiffs.

Accordingly, the second and fourth causes of action are dismissed.

D. *Fifth, Sixth, and Seventh Claims – Promissory and Equitable Estoppel*

1. Promissory Estoppel

The elements of promissory estoppel are: "(1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise." *Sabre Int'l Sec., Ltd. v. Vulcan Capital Mgmt., Inc.*, 95 A.D.3d 434, 439 (1st Dep't 2012).

In support of their promissory estoppel claim, Plaintiffs point to INA's statement to the Bank that its sales volume had increased substantially in 2013 and that it needed increased credit. INA then entered into agreements with several companies, including non-party Ralcorp. The Bank assured INA and Eugene Sobeck that it would finance the additional business and asked INA to advise it "of additional opportunities to add customers in the import community to increase the bank's customers." (Compl. ¶ 11.) Based on the Bank's assurances, INA made purchases to support its significant increase in business, and the bank "increased the line of credit." *Id.*

Nevertheless, the documentary evidence refutes Plaintiffs' allegations. Specifically, a promissory estoppel fails where the promise alleged is flatly contradicted by a written agreement covering the same subject matter and superseding all other prior agreements. *Capricorn Invs. III, L.P. v. CoolBrands Int'l, Inc.*, 66 A.D.3d 409, 410 (1st Dep't 2009). Moreover, a promissory estoppel claim is not viable where the conduct underlying the claim is governed by contract, and where the plaintiff fails to allege a duty independent of the contract. *Coleman & Assoc. Enters., Inc. v. Verizon Corporate Servs. Group, Inc.,* 125 A.D.3d 520, 521 (1st Dep't 2015); *Saivest Empreendimentos Imobiliarios E. Participacoes, Ltda v. Elman Invs., Inc.*, 117 A.D.3d 447, 449 (1st Dep't 2014).

In paragraph one of the November 2013 and February 2014 promissory notes, INA acknowledges that the line of credit is closed, that no further advances are available under that line, and that it has no offsets, claims or defenses to the subject note or other loan documents. Moreover, the November 2013, February 2014, and June 2014 promissory notes provide that neither party is relying on any promise, agreement or understanding not set forth in the subject note or other loan documents and that no note or loan document may be amended, except in writing signed by both parties. The Forbearance Agreement likewise provides that it is the entire agreement between the Bank and INA on the subject matter and that it cannot be modified except in a writing signed by both parties.

The parties' writings therefore belie Plaintiffs' claims. The writings state that no more credit is forthcoming and thus contradict the basis of the promissory estoppel claim. The writings state that there are no other agreements between the parties and that the writings supersede other agreements, oral or written. Also, Plaintiffs do not allege a duty assumed by the Bank that was separate from the duties in the writings.

2. Equitable Estoppel

Plaintiffs also present a claim of equitable estoppel, a doctrine used to prevent the enforcement of rights which would work fraud or injustice. *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt.,* L.P., 7 N.Y.3d 96, 106 (2006). A plaintiff asserting estoppel must show that defendant engaged in conduct which amounted to a false representation or concealment of material facts, that this party knew the truth, and that this party intended the plaintiff to act upon the false representation or concealment. *BWA Corp. v. Alltrans Express U.S.A.,* 112 A.D.2d 850, 853 (1st Dep't 1985). Regarding its own conduct, the plaintiff must "demonstrate a lack of knowledge of the true facts; reliance upon the conduct of the party estopped; and a prejudicial change in position." *River Seafoods, Inc. v. JPMorgan Chase Bank,* 19 A.D.3d 120, 122 (1st Dep't 2005).

Plaintiffs fail to allege that they relied to their detriment on any sort of misleading conduct by the Bank. The documents show that credit was extended, that the expiration

dates of notes were lengthened, and that the parties entered into a Forbearance Agreement, which gave Plaintiffs more time to repay the Bank. Unlike promissory estoppel, which involves a statement regarding future conduct, equitable estoppel involves a misrepresentation of existing fact. *In re 80 Nassau Assoc. v. Crossland Fed. Sav. Bank,* 169 B.R. 832, 842 (Bankr. S.D.N.Y. 1994). No misrepresentation of fact by word or deed is alleged here.

The Bank is not alleged to have had any knowledge that Plaintiffs did not have, except to the extent that Plaintiffs allege that the Bank officials knew that they had no intention of honoring the alleged promise of extending more credit. A plaintiff cannot obtain relief for equitable estoppel where the only misconduct alleged is that the defendant made an agreement with plaintiff without intending to perform the agreement. *See Randolph Equities, LLC v. Carbon Capital, Inc.*, 648 F. Supp 2d 507, 524 (S.D.N.Y. 2009). In addition, estoppel does not create rights to something for which a party does not otherwise have a right. *Wilson v. One Ten Duane St. Realty Co.,* 123 A.D.2d 198, 200 (1st Dep't 1987). INA does not show a right to additional credit.

The Sobecks' guaranties waive the right to interpose any defense, setoff, claim, deduction, or counterclaim of any nature or description in any action or proceeding instituted by the Bank with respect to the guaranty or any matter arising herefrom or relating hereto. A waiver is appropriate documentary evidence for the purposes of a

CPLR 3211(a)(1) motion. *See Excel Graphics Tech v. CFG/AGSCB 75 Ninth Ave.*, 1 A.D.3d 65, 69 (1st Dep't 2003); *Banque Nationale de Paris v. 1567 Broadway Ownership Assoc.*, 214 A.D.2d 359, 361 (1st Dep't 1995). Based on this waiver, and for the foregoing reasons, Plaintiffs' equitable and promissory estoppel claims must be dismissed.

E. *Ninth Claim – Breach of the Implied Covenant of Good Faith and Fair Dealing*

All contracts imply a covenant of good faith and fair dealing in the course of performance. *Forman v. Guardian Life Ins. Co. of Am.*, 76 A.D.3d 886, 888 (1st Dep't 2010). "This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* The duties of good faith and fair dealing do not imply obligations inconsistent with the rest of the contract. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002). The duties are those that a reasonable person in the position of the promisee would be justified in thinking were included in the agreement. *Id.* "The covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Xerox Corp.*, 25 A.D.3d 309, 310 (1st Dep't 2006).

Plaintiffs' allegation that the Bank breached the implied covenant by not providing more credit or by interference is not valid. The loan documents and the promissory notes cannot be construed to contain a provision that more credit or more forbearance on the loans will be forthcoming. Nor do the facts show that the Bank prevented INA from receiving the benefits of the promissory notes and loan documents. Therefore, this claim is dismissed.

F. *Tenth Claim – Violation of the Equal Credit Opportunity Act*

The Complaint next alleges that by requiring Ann Marie Sobeck to make a guaranty and mortgage, the Bank violated the Federal Equal Credit Opportunity Act ("ECOA"), which prohibits a creditor from requiring a credit applicant's spouse to sign a credit instrument. *See* 15 U.S.C. § 1691. The original purpose of ECOA was to stop creditors' practice of requiring a husband to co-sign the credit application of a married woman as a condition of approving her application. *See U.S. v. Lowy,* 703 F. Supp. 1040, 1046 n.8 (E.D.N.Y. 1989). A violation of ECOA voids the obligation of the party who was wrongly required to sign the credit instrument but does not void the underlying debt. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 33 (3d Cir. 1995); *Citibank, N.A. v. Silverman,* 85 A.D.3d 463, 464 (1st Dep't 2011).

Plaintiffs allege that Ann Marie Sobeck's signatures on the guaranty and mortgage were wrongly required because Mr. Sobeck was creditworthy and was eligible for credit on his own. Under ECOA, when an applicant lacks sufficient assets to meet a creditor's standards of creditworthiness, the creditor may require that an additional person become liable to pay. The applicant's spouse may act as the additional person, but the creditor may not require that the spouse be that additional person, whether the applicant is creditworthy or not. *See* Paul Barron & Dan Rosin, 1 Federal Regulation of Real Estate and Mortgage Lending § 8:70 (4th ed. 2016). "Significantly, it is the lender's requirement for the spouse to sign, not the signature itself, that is the gravamen of the ECOA violation." *Id.*

The rule that the creditor may not require the spouse to sign applies to the spouses of guarantors, as well as the spouses of applicants. Both 12 CFR § 202.7(d)(6) and 12 CFR § 1002.7 bar the creditor from requiring the signature of a guarantor's spouse in the same way that the creditor is barred from requiring the signature of an applicant's spouse. *See U.S. v. Joseph Hirsch Sportswear, Co.,* 1989 WL 20604, at *1-*2 (E.D.N.Y. 1989), *aff'd sub nom U.S. v. Hirsch,* 923 F.2d 842 (2d Cir. 1990).

The Bank argues that Mrs. Sobeck has no standing to bring an ECOA claim. The Bank draws attention to an Eighth Circuit decision, *Hawkins v. Community Bank of Raymore,* 761 F.3d 937, 941-942 (8th Cir 2014), which recently was affirmed by the

United States Supreme Court. *See Hawkins v. Cmty. Bank of Raymore,* 761 F.3d 937, 941-942 (8th Cir. 2014), *aff'd* 136 S.Ct 1072 (2016).

Hawkins held that spouses who each signed a guaranty were not applicants under ECOA. The husbands in *Hawkins* were members in a limited liability company. The wives had no legal interest in the company. The Court emphasized that the wives did not argue that they qualified as applicants for any other reason than being guarantors and that they did not allege that they participated in the loan-application process. The company defaulted on loans and the husbands and wives executed personal guaranties in favor of the lending bank. In opposition to the bank's enforcement of the guaranties, the wives alleged that the bank required them to make guaranties securing the loans solely because they were married to their respective husbands. The wives argued that this requirement on the part of the creditor constituted discrimination on the basis of marital status in violation of ECOA. Ann Marie Sobeck makes the same argument regarding the guaranty that she signed.

The *Hawkins* court determined that "applicant" is one who, directly or indirectly, request credit for itself, while a guarantor undertakes to answer for the payment of another's debt. "Thus, a guarantor does not request credit and therefore cannot qualify as an applicant under the unambiguous text of the ECOA." *Hawkins,* 761 F.3d at 941. "[W]e will not defer to the Federal Reserve's interpretation of applicant, and we conclude

that a guarantor is not protected from marital-status discrimination by the ECOA." *Id.* at 942.

The facts underlying *Hawkins* are the same as in this case. The husband's limited liability company borrowed funds and the wife guaranteed the loan. Ann Marie Sobeck disclaims any interest in the company. Since a person does not qualify as an applicant under the statute solely by virtue of executing a guaranty to secure the debt of another, Ann Marie Sobeck is not an applicant and has no standing to press an ECOA claim.

Therefore, Plaintiffs have not stated a violation of the ECOA with regard to either Ann Marie Sobeck or Eugene Sobeck by requiring his wife to sign. Accordingly, this claim is dismissed.

III. **Conclusion**

In conclusion, it is hereby

ORDERED that Defendant's motion to dismiss the complaint is granted in its entirety and the complaint is dismissed; and it is further

ORDERED that Plaintiffs are granted leave to serve an amended complaint so as to replead the first, third, and eighth causes of action only within 20 days after service on Plaintiffs' attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that Plaintiffs fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by Defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the Defendant as taxed by the Clerk.

Dated: New York, New York
September 30, 2016

ENTER

Hon. Eileen Bransten, J.S.C.