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

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ROBERT C. MAYER, JR., D. WALKER WAINWRIGHT, AMERICAN INTERMODAL CONTAINER MANUFACTURING CO., LLC, and AMERICAN INTERMODAL CONTAINER MANUFACTURING, INC., Index No. 652987-2014

Plaintiffs,

-against-

Motion Sequence Nos. 004, 005, 007 and 008

PATRICK MARRON, JOHN MAGUIRE, HOWARD LEGGETT, ONE-WAY LEASE, INC., HUMBERTO GARCIA and WILLIAM FRANCIS HARLEY, III,

Defendants.

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BRANSTEN, J:

This action arises in connection with the removal, in June 2014, of plaintiffs Robert C. Mayer, Jr. (Mayer) and D. Walker Wainwright (Wainwright), as managing members/directors of American Intermodal Container Manufacturing Co., LLC and American Intermodal Container Manufacturing, Inc. (collectively, the Company), by the named individual defendants, including Patrick Marron (Marron), John Maguire (Maguire), Howard Leggett (Leggett), Herberto Garcia (Garcia) and William Harley (Harley). Plaintiffs commenced this action in October 2014.

This decision and order addresses the following motions: (1) plaintiffs' motion to compel J. B. Hunt Transport, Inc. (JB Hunt) to comply with subpoenas (motion sequence number 004); (2) JB Hunt's motion to quash the subpoenas (motion sequence number 005); (3) motion by Navistar, Inc. (Navistar) to compel plaintiffs to defray the expenses incurred by it in response to subpoenas and depositions (motion sequence number 007); and (4) plaintiffs' motion for leave to amend their complaint to add, as defendants, JB Hunt, Navistar and its affiliate International Truck and Engine Investments Corporation (ITEIC) (motion sequence number 008).

I. Background

Plaintiffs' original complaint asserted eight causes of action against the defendants: breach of contract, promissory estoppel, tortious interference with contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with business relations, breach of implied covenant of good faith and fair dealing, and declaratory judgment. (NYSCEF #2). Defendants moved to dismiss the complaint in its entirety (motion sequence number 001). On November 12, 2015, this court issued a decision and order denying, in part, the motion to dismiss (Prior Decision; NYSCEF #39); *Mayer v Marron*, 2015 WL 7074771 (Sup Ct, NY County, 2015). More specifically, the Prior Decision dismissed the seventh (breach of implied covenant of

good faith and fair dealing) and the eighth (declaratory judgment) causes of action of the original complaint. Because the Prior Decision described the background facts of this action in detail, the familiarity with which is assumed, only the germane facts that are relevant to the resolution of the instant motions will be discussed herein.

Significant disputes have arisen in this action in connection with plaintiffs' discovery efforts, which included disputes with the named defendants, as well as with non-parties Navistar and its subsidiary ITEIC (together, Navistar) and JB Hunt (collectively, the Proposed Defendants). Plaintiffs assert that, as a result of such discovery, which plaintiffs claim remains incomplete at this time, they learned that Navistar and JB Hunt had knowingly and substantially assisted the named defendants in their unauthorized control over the Company, as well as in their breach of fiduciary duties and tortious interference with the Company's contracts and business relations. Thus, in the proposed amended complaint (AC), plaintiffs assert three causes of action against each of the Proposed Defendants, namely: tortious interference with contract; aiding and abetting breach of fiduciary duty; and tortious interference with business relations.

The amended complaint alleges that, while initially claiming neutrality in the governance dispute between plaintiffs and the named individual defendants, the Proposed Defendants sided with such defendants and supported their misappropriation and usurpation of the Company's management. AC, ¶ 7. The amended complaint also alleges

that, without the "active encouragement, knowing interference and financial support" of the Proposed Defendants, the defendants "could not have succeeded in misappropriating control of the Company." *Id.*, ¶ 8. The amended complaint further alleges that Navistar secured its oversight of the Company and cemented its relationship with "the individual Defendants' illegally installed management by facilitating the appointment of Navistar's recently retired Chief Operating Officer, Jack Allen, to the position of Chairman of the Company's board," and that Allen continued to serve as "an essential link between Navistar and JB Hunt as they proceeded to side with the individual Defendants in the governance dispute with Plaintiffs." *Id.*, ¶¶ 10-11.

Moreover, the amended complaint alleges that defendants provided Allen with equity in the Company, by purporting to dilute the equity interests of plaintiffs Wainwright and Mayer, and that the Proposed Defendants actively scuttled the financing that the individual plaintiffs had lined up from prominent and well-funded sources and steered the individual defendants away from such financing, thus aiding and abetting defendants' breach of fiduciary duty. *Id.*, ¶¶ 17-19. Furthermore, the amended complaint alleges that, in August 2014, JB Hunt signed a letter of intent with Marron (who acted on behalf of the Company but lacked the authority to do so) to buy $20 million of the Company's freight containers, but the "claimed management" under defendants "only managed to produce fewer than ten complete containers," and that in September 2014, JB

Hunt signed a "convertible preferred equity letter of intent" contemplating an additional investment of $20 million, beyond the first $20 million, but the investment never occurred. *Id.*, ¶¶ 208-210. In essence, the amended complaint alleges that the alliance among the individual defendants and the Proposed Defendants "destroyed the value of the Company and the interests of Plaintiffs and the substantial investors they attracted to the enterprise." *Id.*, ¶ 20.

Notably, during the initial oral argument on the motions held by this court on November 29, 2016, counsel for JB Hunt indicated that, in connection with plaintiffs' motion for leave to amend, certain relevant documents contain confidential and proprietary information that should not be disclosed to the public. 11/29/16 transcript (NYSCEF #188) at 26. Therefore, the court adjourned the hearing on the motion for leave to amend, along with other related motions, and instructed the litigants to file a "sealing motion" and to confer with each other regarding the information that needed to be sealed. *Id.* at 27-30.

Thereafter, at the oral argument held on June 15, 2017 that was scheduled pursuant to a so-ordered stipulation, the court granted, in part, JB Hunt's sealing motion (motion sequence number 10), subject to compliance with the terms and conditions stated in the record. 6/15/17 transcript (NYSCEF #209) at 5-42; sealing order (NYSCEF #213). In addition, during the oral argument, the court also continued to hear arguments on

plaintiffs' motion for leave to amend, including, inter alia, issues regarding the Company's governance dispute and the enforceability of the forum selection clause in the so-called "container purchase agreement." 6/15/17 transcript at 43-54. Moreover, the court commented on, and heard arguments regarding, the expense defrayment motion by Navistar, as well as the two discovery-related motions by plaintiffs and JB Hunt, and reserved decision on the foregoing motions. *Id.* at 55-58.

II. Discussion

As noted by this court during oral arguments, resolution of plaintiffs' motion for leave to amend, particularly in light of the forum selection dispute, would help to decide the issues raised in the discovery-related motions, including Navistar's motion for the defrayment of its expenses incurred in discovery, as well as JB Hunt's opposition to plaintiffs' subpoena based upon the forum selection clause. *See* 6/15/17 transcript at 53-58; 11/29/16 transcript at 5-7. Accordingly, this decision and order will first address plaintiffs' motion for leave to amend.

A. Plaintiffs' Motion for Leave to Amend

CPLR 3025 (b) provides that a party may amend a complaint by "setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by

stipulation of all parties," and that "[l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." While leave to amend is generally freely granted, a motion for leave to amend is committed to the court's broad discretion and "the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered." *Yong Soon Oh v. Hua Jin*, 124 AD3d 639, 640 (2d Dept 2015) (internal citations and quotation marks omitted). "In the absence of prejudice or surprise to the opposing party," the motion should be granted "unless the proposed amendment is palpably insufficient or patently devoid of merit." *Id.*

Further, prejudice has been found to exist where a proposed amendment "was based upon facts that the plaintiff had known since the inception of this action," but plaintiff "sought to add new theories of liability that were not readily discernible from the allegations in the complaint and the original bill of particulars." *Morris v Queens Long Is. Med. Group*, P.C., 49 AD3d 827, 828 (2d Dept 2008).

Navistar's and JB Hunt's Oppositions

In opposing the motion for leave to amend, Navistar argues that the primary reason for plaintiffs seeking an amendment, two years after they commenced this action in October 2014, is "animated by Navistar's demand that Plaintiffs reimburse Navistar for its non-party discovery costs." Navistar opposition at 6-7 (NYSCEF #164). Indeed, as

discussed more fully below, Navistar claims that the expenses it incurred in response to plaintiffs' discovery exceeded $463,000, an amount which plaintiffs contend is egregiously excessive. Putting aside the merit of the defrayment dispute for a moment, Navistar's allegation that the proposed amendment reflects plaintiffs' attempt "to evade their defrayal obligation under New York law by adding Navistar as a defendant" (Navistar opposition at 8) is unpersuasive, because Navistar argues that "even if this Court permits amendment to add Navistar as a defendant, Plaintiffs still must defray Navistar's discovery-related expenses it incurred while a non-party." *Id.* at 8, n 6. If Navistar's argument regarding plaintiffs' defrayal obligation is legally valid, the proposed amendment cannot evade or otherwise mitigate plaintiffs' defrayal obligation under New York law.

On the other hand, JB Hunt argues that, pursuant to the agreements it entered into with the Company, which were signed after the removal of Wainwright and Mayer (when they were no longer officers of the Company), any litigation must be brought in the "United States District Court for the Western District of Arkansas or in the Circuit Court of Benton County, Arkansas." JB Hunt opposition at 2 (NYSCEF #165). JB Hunt also argues that forum selection clauses are upheld and recognized by New York courts, because "they provide certainty and predictability in the resolution of disputes," and that a party opposing the enforcement of a contractual choice of law provision "bears a heavy

burden of demonstrating that the foreign law is offensive to our public policy." *Id.* at 3, citing cases. In sum, JB Hunt argues that the motion for leave to amend must be dismissed because the forum selection provision deprives this court of jurisdiction. Notably, but for the forum selection provision, JB Hunt does not otherwise contend that this court lacks the requisite jurisdiction to hear this action. JB Hunt's argument is unpersuasive.

First, it is undisputed that plaintiffs Wainwright and Mayer are not signatories to the agreements and, thus, they cannot be bound by the contractual provision. The amended complaint also asserts that these agreements are invalid because the individual defendants, who did not have the requisite collective membership vote, lacked the authority to act on behalf of the Company. AC, ¶¶ 205, 216. Because the validity of the agreements is being challenged by plaintiffs, the enforceability of the forum selection provision is held in abeyance until there is a resolution of the challenge.

The Proposed Defendants also allege that the proposed amendment is untimely and unfairly prejudiced them. For example, Navistar argues that, when plaintiffs filed the original complaint in October 2014, they knew the facts that underlie the instant claims (Navistar sided with the individual defendants after they ousted Wainwright and Mayer from management), but belatedly sought to add Navistar as a defendant after it refused to join the settlement negotiations, because it never intended to be a party to the governance

dispute. Navistar opposition at 23-24. On the other hand, JB Hunt argues that plaintiffs' belated effort to add it as a defendant is a "transparent attempt" to add a "deep pocket" to the settlement table. JB Hunt opposition at 8.

Plaintiffs counter that this motion was filed within two weeks of the "much-delayed" document production and initial depositions, and that the Proposed Defendants "went to great lengths" to hide their involvement in this action, and that this motion could only be filed until plaintiffs had "the benefit of some discovery." Plaintiffs reply at 13-14. On balance, plaintiffs' explanation for the timing of filing this motion to amend appears reasonable, and the Proposed Defendants failed to show any significant prejudice if the motion is granted.

In addition to the foregoing, the Proposed Defendants challenge the merits of the three causes of action asserted against them in the amended complaint, as discussed below.

1. Tortious Interference with Contract Claim

Besides challenging plaintiffs' motive in amending the complaint, Navistar argues that the amended complaint contains only "thread-bare allegations" that are "woefully insufficient." Navistar opposition at 8. Navistar contends that the amended complaint, which alleges that Navistar interfered with plaintiffs' oral agreement with Leggett

regarding his disengagement from the Company due to his disabling conflict of interest, has not sufficiently pled the claim of tortious interference with contract because the allegations are conclusory, based on information and belief rather than facts, and fail to allege that Navistar's conduct was the "but for" cause of the breach and plaintiffs' injury. *Id.*, 13-15. Navistar further argues that "the allegations against Navistar fundamentally make no sense - Navistar is and has always been a third party wanting to do business with [the Company,] regardless of who was in charge." *Id.* at 8. JB Hunt makes an identical argument. JB Hunt opposition at 4 ("In short, Plaintiffs' threadbare allegations against JB Hunt are woefully insufficient and make no sense since JB Hunt is and has always been a third party wanting to do business with [the Company] regardless of who was in charge").

With respect to this claim, the law requires that the complaint alleges the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of the contract, the defendant's intentional procurement of the third-party's breach of the contract without justification, and resulting damages. *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996). A review of the amended complaint shows that the tortious interference with contract claim has been sufficiently pled. First, it is undisputed that a valid agreement existed between plaintiffs and Leggett in that he would disengage himself from Company, and that there is a viable claim against him and other individual defendants for breach of contract, as found by this court in the Prior Decision. With

respect to Navistar's "knowledge" of such agreement, the amended complaint alleges that Navistar "knew of the agreement that Leggett would disengage himself," and upon information and belief, Navistar had "actual knowledge of the agreement based on conversations with the individual Defendants, including Marron." AC, ¶¶ 167, 276. Also, the Proposed Defendants do not dispute the allegation that they knew or should have known of such agreement, at the latest, when they reviewed the original complaint filed in October 2014. Indeed, JB Hunt acknowledges that "plaintiffs have known since the time they filed their original complaint (in October 2014) of JB Hunt's discussions and contracts with defendants." JB Hunt opposition at 5-6. Plaintiffs further allege that the Proposed Defendants continued to interfere with such agreement after the filing of the original complaint. Plaintiffs reply at 8, referencing AC, ¶ 215.

The amended complaint alleges that the Proposed Defendants' interference was intentional and wrongful. AC, ¶¶ 161-199. For example, it alleges, among other things, that Navistar began to meddle with the Company's governance and financing in early 2014; that Scott Mackie, Navistar's agent, was aware that Wainwright and Mayer disputed the validity of the June 2014 notices which purportedly removed them from the Company's management; that promptly after the ouster of Wainwright and Mayer, in June 2014, Mackie kept in regular contact with Marron; that Navistar's interference with the Company's governance was motivated by its desire to renegotiate the Product Purchase &

Services Agreement on terms more favorable to it and less favorable to the Company; that in March 2015, Navistar's former executive Jack Allen became the Company's chairman, and the individual defendants purported to dilute the equity interest of Wainwright and Mayer in the Company by providing equity to Allen and others. *Id.* In sum, the amended complaint alleges that Navistar supported the individual defendants' misappropriation of the Company's management, which also depended on Leggett's breaching his agreement to disengage himself from the Company and its operations. Thus, despite Navistar's contention that plaintiffs failed to plead intentional procurement of breach of contract without justification, the amended complaint contains sufficient allegations in this regard.

With respect to JB Hunt, the amended complaint alleges, among other things, that JB Hunt intentionally procured the breach of Leggett's contract and interfered with the Company's management. AC, ¶¶ 200-241. For example, the amended complaint alleges that, as the dominant user of 53-foot containers in the United States, JB Hunt wanted to control the supply of such containers, which were designed and marketed by the Company, and to influence the costs of its competitors; that JB Hunt sought to assert control over the Company's affairs and to position itself for a potential equity stake in the Company by signing a Convertible Preferred Equity Letter of Intent in September 2014; that JB Hunt entered into the Container Purchaser Agreement with the Company which included terms more favorable to it and less favorable to the Company; and that JB Hunt

encouraged the appointment of Allen as the Company's chairman because he served as a critical link between Navistar and JB Hunt. *Id.* Thus, despite JB Hunt's contention that it "just wished to do business with [the Company] and did not care which individual had a membership interest or [who] was in control of same" (JB Hunt opposition at 6), the amended complaint contains sufficient allegations to challenge such contention.

Navistar's argument that the amended complaint failed to plead that its conduct was the "but for" causation of the contract breach is equally unpersuasive. Navistar opposition at 15, citing cases. Notably, Navistar failed to recognize that the amended complaint alleges, among other things, that "the individual Defendants could not have succeeded in misappropriating control of the Company for as long as they did without the active encouragement, knowing interference, and financial support" of Navistar and JB Hunt. AC, ¶ 8.

Accordingly, the amended complaint alleges a viable tortious interference with contract claim against Navistar and JB Hunt, despite their contentions to the contrary.

2. Tortious Interference With Business Relations Claim

The amended complaint alleges that the Proposed Defendants tortiously interfered with business relations, particularly with respect to plaintiffs' (i.e. Wainwright's and Mayer's) capital raising efforts for the Company.

A tortious interference with business relations claim does not require a breach of an existing contract, but the claimant must meet a "more culpable conduct" standard. *Law Offices of Ira J. Leibowitz v Landmark Ventures, Inc.*, 131 AD3d 583, 585 (2d Dept 2015) (citation omitted). The standard is met where the interference was achieved by "wrongful means" or when the offender acted for the "sole purpose of harming the other party," including "physical violence, fraud or misrepresentation . . . and some degrees of economic pressure." *Id.* at 585-586 (citations omitted). The offending party's conduct "must amount to a crime or an independent tort . . . to create liability for interference." *Id.* at 586 (citations omitted). However, if the actions are "motivated by economic self-interest, they cannot be characterized as solely malicious." *Id.* (citations omitted). *Accord Thome v The Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 (1st Dept 2009).

In its opposition, Navistar argues that no facts have been pleaded in the amended complaint to show that it interfered with the Company's potential investors or that the alleged interference was acted "solely out of malice" to harm plaintiffs. Navistar opposition at 17-18. Navistar also argues that there are no allegations that it told investors to refrain from investing in the Company, and the fact that Navistar eventually "sided" with the individual defendants, but not with plaintiffs, does not constitute interference. *Id.* Navistar further argues that the allegations merely establish that it was

attempting to do business with the Company to "further its own legitimate commercial interest," a factor that is "fatal" to this claim. *Id.*, citing cases. JB Hunt echoes essentially the same arguments. JB Hunt opposition at 6-7.

Plaintiffs counter that the Proposed Defendants "knew" of the available funding from Robert Young, a successful software company, as well as the additional financing from a major private equity firm, but they actively scuttled such reliable funding sources. Plaintiffs reply at 11. Plaintiffs also argue that the Proposed Defendants, especially JB Hunt, sought to assert control over the Company's management and position itself for a potential equity stake by "luring" the individual defendants into alternative financing arrangements on less favorable terms. *Id.* at 12. Plaintiffs further contend that this court has previously held that a breach of fiduciary duty is an "independent tort" that can satisfy the "unlawful means" requirement of a tortious interference claim. *Id.* at 10, citing *243rd St. Bronx R&R LLC v Jungreis*, 2015 WL 3524589, 2015 NY Slip Op 30951 (U) (Sup Ct, NY County 2015) (Bransten, J).

Assuming the veracity of plaintiffs' allegations, they only establish that the Proposed Defendants interfered with plaintiffs' potential business relations with others in an attempt to extract a more favorable economic advantage for themselves. This, however, does not satisfy the "unlawful means" or "solely malicious" requirement of a tortious interference of business claim. *See Law Offices of Ira J. Leibowitz*, 131 AD3d at

586 (defendant's actions that were "motivated by economic self-interest . . . cannot be characterized as solely malicious"). Also, the amended complaint does not allege that the Proposed Defendants breached their fiduciary duties and committed fraud and, thus, plaintiffs' reliance on *Jungreis* is misplaced. *See Jungreis*, 2015 WL 3524589 at *9 ("Plaintiffs plead that Defendants breached their fiduciary duties and committed fraud," which satisfied the "unlawful means requirement"). Accordingly, plaintiffs' request to add this claim against the Proposed Defendants must be denied.

3. Aiding and Abetting Breach of Fiduciary Duty

Finally, the amended complaint asserts an aiding and abetting breach of fiduciary duty claim against the Proposed Defendants. Because the Company is incorporated in Delaware, Delaware law applies to a claim of aiding and abetting a breach of duty by a fiduciary of a Delaware entity. *MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529, 531 (1st Dept 2015). To plead the claim, a complaint must allege the existence of a fiduciary relationship, a breach of the fiduciary's duty, the defendant's knowing participation in the breach, and resulting damages. *Malpiede v Townson*, 780 A2d 1075, 1096 (Del 2001). "Knowing participation" requires an allegation that the defendant acted with "knowledge that the conduct advocated or assisted constitutes such a breach." *Id.* at 1097. This element may be inferred "if a fiduciary breaches its duty in

an inherently wrongful manner, and the plaintiff alleges specific facts from which the court could *reasonably infer knowledge* of the breach." *Nebenzahl v Miller*, 1996 WL 494913, at *7 (Del Ch. Aug. 26, 1996) (emphasis added). Notably, the Prior Decision held that plaintiffs have a viable aiding and abetting breach of fiduciary duty against Maguire and Leggett.

The amended complaint alleges that the Proposed Defendants, along with Maguire and Leggett, aided and abetted breaches of fiduciary duty by Marron, Garcia and Harley. AC, ¶¶ 295. Specifically, the amended complaint alleges that the Proposed Defendants knowingly assisted the individual defendants to "grab control" of the Company from Wainwright and Mayer, that the individual defendants owed fiduciary duties (to the extent that they purport to control the Company) to other members of the Company (i.e. Wainwright and Mayer), and the Proposed Defendants caused the individual defendants to undercapitalize the Company, causing plaintiffs substantial financial harm, including lost business opportunities and profits. *Id.*, ¶¶ 296-305.

Navistar argues that the amended complaint contains no factual allegation to support that it "knowingly participated" in the alleged breach or that it was involved in the Company's own governance dispute. Navistar opposition at 20. Navistar also argues that plaintiffs' allegations that Navistar chose sides after the dispute, that it met with potential investors after the ouster, and that it facilitated the appointment of Allen as the

Company's chairman after the ouster, do not show that Navistar "knew any of this conduct was assisting in a breach of fiduciary duty relating to the ouster." *Id.* Navistar further argues that plaintiffs' conclusory allegation that it caused the defendants to undercapitalize the Company is flawed, because "Navistar's intent all along was to continue to do business with [the Company,] not thwart its success (or assist others in thwarting its success)." *Id.* at 21. Hence, Navistar argues that the amended complaint fails to allege specific facts regarding its knowledge to sustain the instant aiding and abetting claim. *Id.* JB Hunt asserts substantially the same arguments. JB Hunt opposition, at 7-8.

In reply, plaintiffs contend that other portions of the amended complaint also allege that Navistar began meddling with the Company's governance and financing options by early 2014; that Scott Mackie (Navistar's agent) kept in regular contact with Marron following the issuance of the June 2014 notices by the defendants to remove Wainwright and Mayer from management; and that Scott Mackie, Ray Cooperman and Walter Borst (all agents of Navistar) aided and abetted in the breach of fiduciary duty. AC, ¶¶ 98, 102, 162, 165, 167, 196. The amended complaint also alleges, that Navistar's own internal email showed that it sided with the "junior shareholders" in the governance fight despite concerns about Marron's management authority, and Mackie referred to Marron as the Company's principal and president; that Mackie arranged meetings

between Marron and JB Hunt, while excluding Wainwright and Mayer, in a deliberate act that destroyed the funding options lined up by Wainwright and Mayer and steered control of the Company's finances to Navistar's primary customer (JB Hunt); and that Navistar assisted the defendants to assert control over the Company and caused it to undercapitalize, thus aiding and abetting a breach of fiduciary duties. *Id.*, ¶¶ 170-175, 183-186. Plaintiffs further allege that Navistar facilitated the defendants' breach of fiduciary duty by appointing Allen as the chairman, enabling him to dilute plaintiffs' equity in the Company so as to gain control over its affairs. *Id.*, ¶¶ 189-191. Plaintiffs assert similar allegations against JB Hunt. *Id.*, ¶¶ 201-208, 213-225. Thus, the amended complaint contains sufficient factual allegations for this court to infer that the Proposed Defendants knowingly participated in the defendants' breach of fiduciary duty.

Hence, plaintiffs' motion seeking leave to amend the complaint is granted, but only to the extent of permitting the assertion of the third (tortious interference with contract) and the fifth (aiding and abetting breach of fiduciary duty) causes of action against the Proposed Defendants.

B. Navistar's Motion to Compel Defrayal of Discovery-Related Expenses

By motion via an order to show cause (by Order of the Court for purposes of controlling the calendar), Navistar seeks to compel plaintiffs to reimburse Navistar, as a

purported non-party, for the reasonable expenses it has incurred (and will incur) in complying with plaintiffs' subpoenas and deposition requests (motion sequence number 007). CPLR 3111 and 3122 (d) state, in relevant part, that "[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery."

Navistar asserts that it has responded to plaintiffs' various subpoenas and discovery requests as a non-party and, pursuant to the CPLR, plaintiffs must defray Navistar's reasonable expenses incurred to comply with same. Braveman affirmation, ¶ 3. Navistar also asserts that, although it made three document productions where more than 24,000 pages of responsive material has been produced, Navistar was forced by plaintiffs to "coordinate, negotiate, draft, and file stipulations to extend the briefing schedule on [plaintiffs' motion to compel production,] thereby resulting in additional costs to Navistar." *Id.*, ¶ 22. Navistar further asserts that, in a detailed accounting of the expenses associated with responding to plaintiffs' discovery requests, it has incurred in excess of $463,000. *Id.*, exhibit O, appendix A (itemized legal fees and expenses incurred).

Plaintiffs argue that it should not have to pay for Navistar's fees and expenses because Navistar has long been aware of plaintiffs' view that it shares responsibility with the individual defendants for plaintiffs' loss, as discovery also revealed that Navistar has substantially assisted in the defendants' ouster of plaintiffs as the Company's managers,

and that Navistar has been invited on many occasions to participate in discussions to settle this action on a global basis, but has consistently refused. Berry opposition, ¶¶ 4-6. Plaintiffs also argue that Navistar would have been named as a defendant long ago, but for its and the individual defendants' effort "to delay and withhold discovery and conceal their misconduct." *Id.*, ¶ 8. Plaintiffs further argue that, if the entity requests reimbursement "is not a classic disinterested non-party," such as Navistar, and "has not offered any basis for determining the reasonable costs for compliance with the subpoena," its request should be denied. *Id.*, ¶ 20, citing, inter alia, *In re Honeywell Intl., Inc. Sec. Litig.*, 230 FRD 293, 302-303 (SD NY 2003). Plaintiffs also assert that the reimbursement amount in excess of $463,000 is astronomical, unreasonable and embarrassingly high, and that the claimed discovery-related expenses are "self-inflicted" because Navistar has repeatedly raised baseless objections and argued meritless motions. Berry opposition, ¶¶ 25-42. Plaintiffs also assert that because Navistar should be viewed as a party, CPLR 3122 (d), which applies to a non-party, is inapplicable, and, thus, Navistar is not entitled to defrayal of expenses. *Id.*, ¶¶ 16-17.

Navistar contends that, it has always been a non-party and regardless of whether the court grants plaintiffs' motion for leave to amend, plaintiffs "must still defray Navistar's reasonable discovery-related expenses incurred during the time it was a non-party," because the "CPLR and all New York caselaw make that clear." Braveman reply,

¶¶ 5-6, citing *Finkelman v Klaus*, 17 Misc 3d 1138 (A), *6, 2007 NY Slip Op 52331 (U) (Sup Ct, Nassau 2007) (Bucaria, J). Navistar also contends that plaintiffs' reliance on *Honeywell*, a federal court case, is inapposite because that case "applies an entirely different statutory scheme regarding sanctions and cost-shifting (not mandatory defrayal as required by the CPLR)." *Id.*, ¶ 7. Navistar further contends that, unlike the facts and law stated in *Honeywell*, it has included an accounting of each category of fees and expenses associated with responding to plaintiffs' discovery, which, as of July 2016, totaled more than $471,000, consisting of $72,000 of "e-discovery vendor expenses" and $400,000 in legal fees. *Id.*, ¶ 8, referencing exhibit A.

Navistar's contentions are persuasive. While the CPLR only states that a non-party is entitled to "reasonable production expenses," there is authority indicating that such expenses may also cover production-related costs, "including attorneys' fees, to a non-party for costs incurred in complying with a subpoena." *Parklex Assocs. v Parklex Assocs., Inc.*, 33 Misc 3d 1216 (A), *4 n 8, 2011 NY Slip Op 51951 (U) (Sup Ct, Kings County 2011) (Demarest, J), citing *Finkelman*. Notably, however, the attorneys' fees and other expenses incurred must be "reasonable." In this case, while contending that its discovery-related fees and expenses were the result of plaintiffs' "uncompromising and heavy-handed discovery tactics," (Braveman reply, ¶ 18), Navistar provides little or no documentation, other than two simple charts with numbers (i.e. Braveman reply, exhibit

A), as support for its request for the defrayal of its legal fees and expenses incurred. Notably, of the $400,000 in legal fees, the bulk were incurred from March 2016 to July 2016, and only $1,100 were incurred by paralegals. Because of the lack of detailed documentation, the reasonableness of the legal fees and e-discovery vendor expenses, cannot now be determined, and this issue will be referred to a Special Referee, to hear and report with recommendations.

C. Plaintiffs' Motion to Compel JB Hunt's Compliance With Subpoena And JB Hunt's Motion to Quash Subpoena

By motion via an order to show cause (motion sequence number 004), plaintiffs seek an order of this court, pursuant to CPLR 3101, to compel JB Hunt to comply with the subpoena duces tecum issued to JB Hunt and served on its registered agent in New York on April 7, 2016 (document subpoena), as well as the subpoena ad testificandum served on JB Hunt's registered agent in New York on July 6, 2016 (deposition subpoena). In support of this motion, plaintiffs, by their counsel, assert that after months of meeting and conferring, JB Hunt failed to produce any documents nor agreed to produce a witness for deposition. Berry affirmation, ¶¶ 21, 22. Plaintiffs also assert that they have learned through discovery from other sources, including from the individual defendants and Navistar, that even though JB Hunt tried to distance itself from the Company's

governance dispute, JB Hunt has actively supported and continues to support the defendants' misconduct committed against plaintiffs. *Id.*, ¶ 20. Plaintiffs further assert that, because JB Hunt has "stonewalled discovery" that is material and necessary to this action, they are invoking CPLR 3101(a), which entitles them to "full disclosure of all matter material and necessary in the prosecution or defense of [this] action." *Id.*, ¶¶ 23, 24.

Opposing plaintiffs' motion, JB Hunt, by its counsel, argues that, as an initial matter, it is not subject to the subpoena power of this court because JB Hunt, a non-party in this action, is a Georgia corporation with its principal place of business in Lowell, Arkansas, and that at the time of the governance dispute, JB Hunt was and remains domiciled in Arkansas. Geter affirmation, ¶¶ 6-8. JB Hunt also argues that plaintiffs have failed to show that the information they seek is unavailable from other sources, and that "more than mere relevance and materiality is necessary to warrant disclosure from a nonparty." *Id.*, ¶¶ 17-18, citing cases. JB Hunt further argues that the document subpoena does not set forth any reason why plaintiffs seek disclosure and, in any event, JB Hunt's position is that any and all documents within its possession that are responsive to the subpoena and related to the governance dispute should also be in the possession of the individual defendants and Navistar. *Id.*, ¶¶ 3, 19-22.

Notably, JB Hunt does not dispute that its registered agent, Corporation Service Company, has been duly served with the subpoenas at its New York City address. Plaintiffs also counter that JB Hunt failed to object to jurisdiction in its April 27, 2017 letter (which was e-filed in this action) and that JB Hunt's counsel, in the "multiple meet-and-confer telephone calls with Plaintiffs' counsel," never raised the lack of personal jurisdiction as a defense, and thus JB Hunt "has waived any objection to personal jurisdiction." Berry reply affirmation, ¶ 5. Plaintiffs also contend that JB Hunt has transacted business in New York in connection with the events underlying this action, and that the agreements between JB Hunt and the defendants were also negotiated, at least in part, in New York. *Id.*, ¶¶ 7-9. Plaintiffs also assert that the highest court has stated that CPLR 3101 (a) (4) "imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source . . . [and] so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." *Id.*, ¶ 12, quoting *Kapon v Koch*, 23 NY3d 32, 38 (2014). Moreover, the Court of Appeals has stated that the "material and necessary" standard, as used in CPLR 3101, "must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist [in] preparation for trial by sharpening the issues and reducing delay and prolixity." *Koch*, 23 NY3d at 38 (internal citations and quotation marks omitted).

Plaintiffs' arguments in support of the motion to compel disclosure are persuasive. Also, based upon the discussions stated above, this court has authorized plaintiffs to amend their complaint to add JB Hunt and Navistar as defendants in this action. Hence, JB Hunt's argument based on its non-party status is unavailing. Accordingly, this court grants plaintiffs' motion (sequence number 004) seeking to compel JB Hunt to comply with plaintiffs' document and deposition subpoenas served upon JB Hunt. Correlatively, this court denies JB Hunt's motion seeking to quash the deposition subpoena (sequence number 005).

III. **Conclusion**

Accordingly, based on all of the foregoing, it is

ORDERED that plaintiffs' motion to compel J.B. Hunt Transport, Inc. (JB Hunt) to comply with subpoenas (motion sequence number 004) is granted; and it is further

ORDERED that JB Hunt's motion to quash plaintiffs' subpoena (motion sequence number 005) is denied; and it is further

ORDERED that the motion of Navistar, Inc. (Navistar) seeking an order to compel plaintiffs to defray its reasonable expenses incurred to comply with plaintiffs' subpoenas (motion sequence number 007) is held in abeyance pending this court's receipt of a report by a Special Referee, to hear and report with recommendations, on the issue regarding the reasonableness of the legal fees and the e-discovery vendor expenses incurred by Navistar, and in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel for the party seeking the reference, or absent such party, counsel for the plaintiffs, within 30 days from the date of this order, shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that plaintiffs' motion for leave to amend their complaint to add JB Hunt, Navistar and its affiliate International Truck and Engine Investments Corporation, as defendants in this action (motion sequence number 008), is granted to the extent of

permitting plaintiffs' assertion of the third (tortious interference with contract) and the fifth (aiding and abetting breach of fiduciary duty) causes of action against the aforesaid parties (collectively, the Additional Defendants); and it is further

ORDERED that, the Additional Defendants are directed to serve an answer to plaintiffs' amended complaint within 20 days after service of a copy of this order with notice of entry.

Dated: Feb. 8, 2018

ENTER:

J.S.C.

HON. EILEEN BRANSTEN
J.S.C.