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| Multibank, Inc. v Access Global Capital LLC |
| 2018 NY Slip Op 30778(U) |
| April 23, 2018 |
| Supreme Court, New York County |
| Docket Number: 650637/2016 |
| Judge: Shirley Werner Kornreich |
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 650637/2016
MULTIBANK, INC.
vs.
ACCESS GLOBAL CAPITAL LLC
SEQUENCE NUMBER : 005
DISQUALIFY COUNSEL

INDEX NO. _____
MOTION DATE 3/29/18
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 177-199

Answering Affidavits — Exhibits _____ | No(s) 202-240

Replying Affidavits _____ | No(s) 243

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER**

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

Dated: 4/23/18


_____, J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

- 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
- Cross Motion
OF 16

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 54

-----X
 MULTIBANK, INC.,

Index No.: 650637/2016

Plaintiff,

DECISION & ORDER

-against-

ACCESS GLOBAL CAPITAL LLC, JAMES BESCH,
 GLOBAL COMMODITIES GROUP LLC, and NOVEL
 COMMODITIES S.A.,

Defendants.
 -----X

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 005, 006, and 007 are consolidated for disposition.

Defendants Access Global Capital LLC (Access), Global Commodities Group LLC (Global), and James Besch (collectively, the Besch Defendants) move to disqualify Michelle Rice, Esq. and Kaplan Rice LLP as counsel for plaintiff Multibank, Inc. (Multibank). Seq. 005. Multibank opposes and cross-moves for sanctions. The Besch Defendants move for leave to amend their answer to assert additional affirmative defenses. Seq. 006. Multibank opposes many of the proposed amendments. Finally, Multibank seeks a ruling that its first and third causes of action against the Besch Defendants are timely under Panamanian law. Seq. 007. The Besch Defendants oppose. The court reserved on the motions after oral argument. *See* Dkt. 339 (3/13/18 Tr.).¹ For the reasons that follow, the motions are granted in part and denied in part.

I. Background

By order dated January 9, 2017, the court, *inter alia*, denied the Besch Defendants' motion to dismiss Multibank's first cause of action for breach of contract and third cause of

¹ References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

action for tortious interference with contract. *See* Dkt. 115 (the MTD Decision).² The MTD Decision was affirmed by the Appellate Division. *Multibank, Inc. v Access Global Capital LLC*, 158 AD3d 458 (1st Dept 2018). The allegations in this case and the history of the underlying arbitration are extensively set forth in the MTD Decision and are not repeated here. Simply put, in this action, Multibank sued Besch and his companies, Access and Global, for obtaining a credit insurance policy that did not cover the subject “forfeiting” transaction – “a factoring agreement in which Multibank purchased a \$4.9 million account receivable from Novel on the sale of beans to [Covadonga].” MTD Decision at 2.

II. *Panamanian Statute of Limitations*

A threshold issue in this case – and one that affects the scope of discovery and the Besch Defendants’ motion to disqualify Multibank’s counsel – is whether Multibank’s claims are barred by the applicable Panamanian statute of limitations. As discussed in the MTD Decision, under CPLR 202, Multibank’s claims must be timely under both New York and Panamanian law. *See* MTD Decision at 8-9. While it is undisputed that Multibank’s claims are timely under New York law, the Besch Defendants previously sought dismissal on the ground that Multibank’s claims are time-barred under Panamanian law. This court held that it would not rule on the Besch Defendants’ Panamanian statute of limitations defense because the parties failed to submit evidence of Panamanian law in conformity with CPLR 3016(e) and 4511(d). *See id.* at 9-10. The Appellate Division agreed. *See Multibank*, 158 AD3d at 459.

² Capitalized terms not defined herein have the same meaning as in the MTD Decision.

Moreover, Multibank could still have a viable claim if the Tolling Agreement applied. See MTD Decision at 12-15.³ Litigation regarding the applicability of the Tolling Agreement implicates the question of whether Ms. Rice has an advocate-witness problem given her involvement in its drafting. See 22 NYCRR 1200.0 (Rules of Professional Conduct), Rule 3.7. Additionally, the scope of the remaining discovery will be significantly broader if this remains an open issue. Hence, Multibank seeks a ruling that its claims are timely under Panamanian law, regardless of whether the Besch Defendants are bound by the Tolling Agreement.

To resolve the limitations question, the parties submitted competing affirmations from attorneys who are experts in Panamanian law.⁴ See Dkt. 265 (Mizrachi Aff.); Dkts. 322 & 323 (Durling Affs.).⁵ The experts are largely in agreement. They agree that Multibank's breach of contract claim has a three-year limitations period, while the tortious interference claim has a one-year limitations period. They also agree on when these causes of action accrue.

On a breach of contract claim, Mr. Mizrachi explains that the claim accrues when it is "enforceable", which is when a plaintiff can demand payment from a defendant. See Dkt. 265 at 6. Hence, he concludes that Multibank's claim accrued when the arbitrators decided on

³ While the Besch Defendants stated at oral argument that Access' failure to execute the Tolling Agreement is an absolute bar to its enforceability, both this court and the Appellate Division have already rejected that argument. See *Multibank*, 158 AD3d at 459.

⁴ Since, as the experts aver, Panama has a civil law system that does not generate precedential judicial opinions absent three high court rulings on the same subject (which is indisputably lacking here and, in any event, are not strictly binding) [see Dkt. 265 at 4-5], this court must rely on expert affidavits to understand its laws.

⁵ Mr. Durling, the Besch Defendants' expert, did not submit new affirmations. Rather, as exhibits to their opposition papers on the instant motion, the Besch Defendants simply submitted his two affirmations that were proffered on their prior motion to dismiss. Consequently, Mr. Durling does not directly respond to the opinions of Mr. Mizrachi (Multibank's expert) on the accrual question, as Mr. Mizrachi did not opine on this issue until the instant motion (his prior affirmation on the motion to dismiss, Dkt. 81, was limited to the tolling issue).

November 18, 2015⁶ that AIG did not have to provide coverage. *See id.* Likewise, Mr. Durling opines that a breach of contract claim accrues under Panamanian law “when the obligation is enforceable and the creditor can request its compliance.” *See* Dkt. 322 at 3-4; *see also* Dkt. 323 at 4 (same). This is consistent with the language of Article 1650 of the Panamanian Commercial Code. *See* Dkt. 267 at 3 (“the statute of limitation will run as of the day on which the obligation is enforceable.”). Mr. Durling, however, takes the position that Multibank’s breach of contract claims accrued when the FFC was executed on October 20, 2010⁷ because, at that time, though unbeknownst to Multibank, the insurance that had been procured by the Besch Defendants in June 2010 did not actually provide coverage for the subject forfeiting transaction.⁸ *See* Dkt. 322 at 4.

Notwithstanding the experts’ dispute, the proper construction of a foreign statute of limitations is a question of law that the court must decide. *Aozora Bank, Ltd. v Morgan Stanley & Co. Inc.*, 2014 WL 3899215 (Sup Ct, NY County 2014) (Schweitzer, J.), (“Where parties disagree on foreign law, the court has the power to determine foreign law after any presentation of evidence which furnishes the court sufficient information to decide. CPLR 4511(b) requires a court to take judicial notice of the laws of foreign countries when requested, and **that the judge determines** questions of foreign law.”) (emphasis added; citations and quotation marks omitted); *see, e.g., Aozora Bank, Ltd. v Credit Agricole Corporate & Investment Bank*, 2015 WL 4575159, at *2-3 (Sup Ct, NY County 2015) (Bransten, J.) (court resolved dispute between dueling expert

⁶ The parties do not dispute that if Multibank’s claims accrued on November 18, 2015, its claims are timely because it commenced this action on February 8, 2016.

⁷ There is no dispute that if Multibank’s claims accrued in 2010, unless the Tolling Agreement applies, Multibank’s claims are time-barred.

⁸ Coverage was not lacking due to anything done by Multibank, but because Global had an undisclosed agency relationship with Novel. *See* MTD Decision at 5.

affidavits on accrual of claim under Japanese law).⁹ Here, the court finds that Mr. Durling's opinion that Multibank's breach of contract claim accrued in 2010 to be inconsistent with both experts' position that such a claim does not accrue until it is actually enforceable and subject to relief.

As Mr. Mizrachi explains:

[T]he alleged contract breach is the nonpayment of the insured amount to Multibank, which was required under the [FFC] if, as happened, Covadonga defaulted on the promissory note endorsed over to Multibank. Because AIG could not have been ordered to pay the insured amount contractually promised to Multibank until the arbitration panel issued a ruling on November 18, 2015, **Multibank could not demand that Access and Besch pay that amount in lieu of AIG until that day.** For this reason, it is my opinion that Multibank's breach of contract cause of action became enforceable on November 18, 2015, triggering the three year prescriptive [i.e., accrual] period.

Dkt. 265 at 6 (emphasis added).

Mr. Mizrachi's opinion is compelling. Multibank had not as yet been harmed when it entered into the FFC without adequate coverage. In fact, as discussed in the MTD Decision, the subject policy covered two transactions – a rice transaction that also suffered from the same defect in coverage as the subject beans transaction. The rice transaction occurred, Covadonga paid for the rice, and the defect caused Multibank no harm.

The import of the insurance was to protect Multibank if and only if Covadonga defaulted. But even then, despite AIG's position that an exclusion barred coverage, Multibank would not have suffered any loss had the arbitrators ruled in its favor. Multibank first learned it would lose its money on the FFC on November 18, 2015, when the arbitrators ruled in AIG's favor. Prior to

⁹ It should be noted that the questions of fact for trial in these cases concerned disputed facts that needed to be adjudicated to determine if the claims actually were time barred. *See, e.g., Aozora Bank*, 2015 WL 4575159, at *3. However, the disputes between the experts on the proper standard of accrual was ruled on by the court as a matter of law. By contrast, while the parties dispute when the claim accrued as a matter of Panamanian law, there is no *factual* dispute regarding its proper application (e.g., the date of arbitrators' decision).

that adverse ruling, Multibank had no claim for damages against the Besch Defendants because it had not yet lost its right to coverage. In other words, until November 18, 2015, there was no obligation for Multibank to enforce against the Besch Defendants. A claim against them would have been speculative.¹⁰

Unlike Mr. Mizrachi, Mr. Durling does not address this issue. Rather, Mr. Durling simply states, in conclusory fashion, that Multibank could have requested compliance and enforced the Besch Defendants' obligations in October 2010. He does not actually explain what could have been done. Not only had the deal closed, but the three-step "round trip" transaction had already occurred in *September* 2010. *See* MTD Decision at 4. The insurance was procured in *June* 2010. Under these circumstances, it is implausible to believe that the defect in coverage could have been corrected in October 2010. Mr. Durling does not contend otherwise. He also does not opine that Multibank could have sued the Besch Defendants for damages at that time. Such a claim would have been unduly speculative under New York law (which governs under section 5.5 of the FFC). *See Apogee Handcraft, Inc. v Verragio, Ltd.*, 155 AD3d 494, 495 (1st Dept 2017) (dismissing claim for breach of contract seeking speculative damages), citing *Lexington 360 Assocs. v First Union Nat'l Bank of N. Carolina*, 234 AD2d 187, 189-90 (1st Dept 1996) ("In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint...." [*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988)]; *Reade v Sullivan*, 259 AD 229 (1st Dept 1940)]. Where a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the breach alleged and relies, instead, on wholly speculative theories of damages, dismissal of the breach of contract claim is in order. [*Kenford Co. v County of Erie*, 67 NY2d 257, 261

¹⁰ If Multibank had brought this claim prior to the arbitral award, it may well have undermined the arbitration.

(1986)].”); *see also TSL (USA) Inc. v OppenheimerFunds, Inc.*, 113 AD3d 410 (1st Dept 2014) (“The motion court properly dismissed, without prejudice, the breach of contract claims as premature. **Plaintiff’s alleged damages ... are too speculative to determine at this juncture.**”) (emphasis added).

To state a claim against the Besch Defendants for proximately causing it actual damages arising under the FFC, Multibank would have had to show that Covadonga defaulted and that Multibank could not recover under the Policy. Absent either of those predicates, no reasonable finder of fact would award Multibank the amount it was supposed to get under the FFC, as it would be premature, absent speculation, to assume that Multibank could not recover from Covadonga or AIG. Ergo, until the second predicate occurred on November 18, 2015, Multibank had no claim to enforce against the Besch Defendants. For this reason, the court rejects Mr. Durling’s contention that Multibank’s contract claim accrued in 2010. The claim is timely.¹¹

As for the tortious interference claim, the parties agree that, pursuant to Article 1706 of the Panamanian Civil Code, “the statute of limitations starts running from the date the victim discovers that he has been aggrieved - i.e., sustained harm - as a result of the negligent or intentional conduct.” Dkt. 265 at 7; Dkt. 322 at 4 (“the statute of limitations of such claims would be one year and it would begin to run from the moment plaintiff **became aware of the facts that caused the damages.**”) (emphasis added); *see* Dkt. 267 at 9 (claim accrues when “the

¹¹ To be sure, Panama’s accrual rule is not universal across jurisdictions and, indeed, is not the law in New York. Under New York law, a breach of contract claim accrues at the moment of breach, regardless of whether the plaintiff has suffered any damages or is even aware of the breach. *ACE Secs. Corp. Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 594 (2015), citing *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 (1993). That, however, is not the law in every jurisdiction. *See, e.g., Lumsden v Design Tech Builders, Inc.*, 358 Md 435, 444 (2000). Nor is it the law in Panama, which has a shorter limitations period but a more generous accrual rule.

aggrieved party **became aware.**") (emphasis added).¹² The experts differ, however, on when this occurred. Mr. Mizrachi takes the position that Multibank became aware that it sustained damages when it learned, on November 18, 2015, of the arbitrators' denial of coverage. *See* Dkt. 265 at 7. Mr. Durling, on the other hand, opined that the claim accrued when Multibank was informed by AIG on November 17, 2011 that it declined to provide coverage (which precipitated the coverage litigation and the arbitration). *See* Dkt. 322 at 4-5.

The court rejects Mr. Durling's position. In doing so, the court relies on the consensus among Commercial Division judges that where accrual of a foreign statute of limitations is triggered by the plaintiff's knowledge of its tort claim, the requisite scope of plaintiff's knowledge includes "every element of the claim." *HSH Nordbank AG v Barclays Bank PLC*, 42 Misc3d 1231(A), at *7 (Sup Ct, NY County 2014) (Friedman, J.) (collecting cases); *see, e.g.*,

¹² As an initial matter, the court rejects the Besch Defendants' argument that the date used to determine the running of pre-judgment interest in the default judgment entered against Novel is dispositive. That date was not litigated (it was, after all, a default judgment motion), and thus the court did not consider Panamanian accrual rules at that time. In light of the instant decision, the Besch Defendants are not foreclosed, in the event they are held liable, from arguing that pre-judgment interest should be computed from November 18, 2015 to the date judgment is entered. It should be noted that, though not raised by the parties, it is unclear if the arbitration tolled the statute of limitations under Article 1706, which appears to provide that where a predicate legal proceeding gives rise to tort liability, the claim accrues upon final resolution of that proceeding. *See* Dkt. 323 at 8 ("statute of limitations of the civil action will start running from the moment the criminal judgment or the administrative resolution ... becomes final and binding"). The court further notes that Durling's translation differs slightly, albeit immaterially, from Mizrachi's. *See* Dkt. 267 at 9 ("Should a criminal or administrative action be timely brought for the facts established in the above-mentioned subsection [i.e., Article 1706], the statute of limitation for civil action shall run as of the finality of the criminal judgment or the administrative resolution, where appropriate."). Likewise, though not dispositive, the Tolling Agreement evidences the parties' understanding that it made no sense for Multibank to litigate against the Besch Defendants until AIG's liability was adjudicated, since the arbitration may have mooted the claim. Were this a situation of potential joint and several liability with AIG, the Besch Defendants, of course, could have been sued from the outset. But here, liability flowed from the premise that Access breached its obligation to procure effective coverage. Had AIG been held liable by the arbitrators, it would have been *res judicata* that Access did not breach. Regardless, Multibank's claim is timely for the reasons set forth herein.

Phoenix Light SF Ltd. v Goldman Sachs Group, Inc., 43 Misc3d 1233(A), at *4 (Sup Ct, NY County 2014) (Ramos, J.); *Allstate Ins. Co. v Credit Suisse Sec. (USA) LLC*, 42 Misc3d 1220(A), at *5-6 (Sup Ct, NY County 2014) (Friedman, J.). This conclusion is animated by the concern that a plaintiff might be put in the perverse situation where its choice is to either plead a claim prematurely or wait until its claim becomes time-barred. See *Phoenix Light SF Ltd. v Ace Secs. Corp.*, 39 Misc3d 1218(A), at *5 (Sup Ct, NY County 2013). Access argues exactly this. It is wrong. The court agrees with Mr. Mizrachi and holds that, under Panamanian law, Multibank's tortious interference claims did not accrue until it could plead actual, non-speculative damages on November 18, 2015.

In sum, the court holds that Multibank's breach of contract and tortious interference claims are timely under Panamanian law. This warrants dismissal of the Besch Defendants' statute of limitations defense, renders academic the parties' disputes over the Tolling Agreement, and moots the Besch Defendants' disqualification motion (as Ms. Rice is no longer a possible, let alone indispensable witness).¹³

¹³ The court declines to sanction the Besch Defendants for moving to disqualify. The motion was not objectively baseless prior to the court's statute of limitations ruling, although it should have awaited trial. See *S & S Hotel Ventures Ltd. P'ship v 777 S.H. Corp.*, 69 NY2d 437, 446 (1987) (in applying advocate-witness rule, complete discovery necessary to determine if others could provide testimony sought from lawyer); *Spinner v County of Nassau*, 82 AD3d 870, 871 (2d Dept 2011) ("Under the circumstances of this case, the Supreme Court's disqualification of Sullivan under the advocate-witness rule was premature. While Sullivan is in a position to offer first-hand testimony concerning what he told the prosecutors [] during the subject meeting, the defendants did not adequately show that Sullivan's testimony would violate the advocate-witness rule. At this early stage of the proceedings, where discovery has not yet been had, disqualification ... is premature.") (internal citations and quotation marks omitted); *Phoenix Assur. Co. of New York v. C.A. Shea & Co.*, 237 AD2d 157 (1st Dept 1997) (same).

III. *The Besch Defendants' Proposed Additional Defenses*

The Besch Defendants move for leave to amend. Leave to amend should be granted unless the proposed defenses are clearly devoid of merit. *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012).¹⁴

First, the Besch Defendants seek leave “to amplify their original pleading of a statute of limitation[s] defense.” *See* Dkt. 246 at 4. While Multibank does not oppose the amendment, this amendment is not permitted because the court has now rejected the defense on the merits.

Further, the Besch Defendants seek to “amplify their already asserted defense under Article 14-a of the CPLR to identify the fault of [DF Deutsche Forfait AG (DF)] as a basis for reducing [Multibank’s] tort claim.” *See id.*¹⁵ There is no merit in a defense based on DF’s

¹⁴ The court agrees with the position set forth in Multibank’s brief that the Besch Defendants’ new counsel is attempting to significantly alter the scope of their defenses from those detailed in their discovery responses prepared by prior counsel. *See* Dkt. 301 at 10-15. While the court agrees that the result would be unfair delay (and may be a goal of the proposed amendments), denial of leave to amend cannot be based on delay alone, but rather must be coupled with prejudice within the meaning of CPLR 3025(b). *Pomerance v McGrath*, 124 AD3d 481, 482 (1st Dept 2015), citing *Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 (1983) (“Mere lateness is not a barrier to the amendment. It must be lateness coupled with **significant prejudice** to the other side”) (emphasis added); *see Murray v City of New York*, 51 AD3d 502, 503 (1st Dept 2008), citing *Barbour v Hosp. for Special Surgery*, 169 AD2d 385, 386 (1st Dept 1991) (prejudice means “some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add”). This sort of prejudice has not been demonstrated and, thus, the court focuses on the merits of the proposed defenses. That said, the Besch Defendants should not expect that the narrow leave to amend granted herein will impel the court to reconsider the court’s many discovery rulings. As Multibank correctly contends, document discovery is complete, and the parties must now proceed to depositions. Disputes over who should be deposed will be addressed at the conference directed herein.

¹⁵ The court assumes the defense is only proffered on the tortious interference claim, and that it is based on CPLR 1411, which provides:

In any action to recover damages for personal injury, injury to property, or wrongful death, **the culpable conduct attributable to the claimant** or to the decedent, including contributory negligence or assumption of risk, shall not bar

supposed fault. It is undisputed that DF, a German bank that is apparently undergoing insolvency proceedings,¹⁶ did business with the Besch Defendants for at least ten years before arranging the subject forfeiting transaction. There also is no question of fact that DF, unlike the Besch Defendants, did not have a contractual obligation to procure credit insurance for the subject transaction. That was the Besch Defendants' responsibility. Similarly, there is no question of fact – because it was adjudicated by the arbitrators – that the insurance procured by the Besch Defendants was ineffective. It was ineffective because Global (Besch's company) improperly served as the undisclosed agent of Novel in the three-step transaction, thereby violating Endorsement 15 of the Policy. In other words, not only was the coverage procured by one of Besch's companies (Access) ineffective, but the very reason for it being ineffective was because his other company (Global) improperly served as Novel's agent, rendering the trade a two-way, round-trip deal between Covadonga and Novel prohibited by the Policy. The lack of coverage was entirely the Besch Defendants' fault. Multibank, whose involvement in the transaction did not occur until the month *after* the three-step transaction was completed and months after the Policy had been procured, bears no blame for the lack of coverage. Knowing what Global's role in the deal was going to be, and knowing that Access had the obligation to procure coverage, Besch nonetheless procured a policy with Endorsement 15. Multibank did not

recovery, but **the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.**

(emphasis added). By contrast, a defense to the breach of contract claim under CPLR 1401 is not viable. *Lehr Assocs. Consulting Engineers, LLP v Daikin AC (Americas) Inc.*, 133 AD3d 533, 534 (1st Dept 2015) (“[P]urely economic loss resulting from a breach of contract does not constitute ‘injury to property’ within the meaning of [CPLR 1401].”).

¹⁶ “[The Besch Defendants’ counsel] advised the Court in one of the compliance conferences that DF is insolvency proceedings in Germany, rendering it impossible for Multibank to obtain the information and documents” from it. Dkt. 270 at 14.

cause Besch to do either of these things. To be sure, while DF may well have been the reason for the structure of the deal, and even if DF's knowledge can be imputed to Multibank, Global was equally aware of the structure and its status as Novel's agent. Yet, Besch, through Access, expressly agreed to provide Multibank with effective credit insurance. That everyone may have had the same knowledge about the structure of the deal does not limit Access's contractual obligations or absolve Global of its liability for causing Access' breach. The Besch Defendants cite no comparable case where such a knowing inducement of a breach was excused.

Nor does the court see any logic in a defense under CPLR 1411 under these circumstances. The documentary evidence in the record shows that DF simply arranged the deal. *See* Dkt. 253 at 1-2 (agreement in which DF was "arranger under this transaction" in which "DF assumes[s] no liability for the completeness, genuineness and correctness of any document drafted and/or provided to Multibank.").¹⁷ In any event, regardless of whether DF can be considered Multibank's agent for certain purposes, Multibank had no responsibility for procuring the credit insurance. On the contrary, Access was supposed to do that for Multibank's benefit. Access *alone* assumed the *contractual* responsibility to procure coverage. Global was the cause of ultimate lack of coverage. Besch, who controlled both companies (and against whom personal liability is asserted based on a veil piercing claim), caused both companies to engage in the actions that give rise to both companies' liability. He had to sign off on the policy procured by Access, and he was aware of Global's relationship with Novel. He, therefore, was the person

¹⁷ The Besch Defendants do not cite any authority for the proposition that where a bank simply arranges a transaction between sophisticated arm's length clients, the bank is considered the agent of one side of the deal. This type of market making is typical and, as here, does not involve the bank taking a net proprietary position on the trade. The bank is not on any side of the deal, but rather makes the deal happen, for instance, by facilitating the required contracts and finding willing counterparties (here, the parties to the FFC). Regardless, as discussed, even if DF can be considered Multibank's agent, Multibank had no responsibility for procuring the credit insurance.

responsible for the missteps of Access and Global. By contrast, neither DF¹⁸ nor Multibank owed a duty to the Besch Defendants to procure effective coverage. Tellingly, the Besch Defendants do not cite any authority for the proposition that a comparative negligence defense for one's own breach can be predicated on the actions of another party who had no responsibility to ensure performance. Simply put, any fault on the part of DF as Multibank's alleged agent has no bearing on whether Access did its job. Even if DF was at fault, its fault cannot be attributed to Multibank.

Likewise, the Besch Defendants cannot contend that DF was a "superseding and intervening" cause of Multibank's loss. Again, of its own volition, Global served as Novel's Agent despite Access procuring a Policy that prohibited this. Neither DF nor Multibank required these occurrences. And again, while DF may have proposed the structure, nonetheless, Access assumed the responsibility for procuring coverage. The Besch Defendants do not cite any authority, nor does it make any cogent argument, justifying their attempt to shift the blame for their failures onto a non-obligated party to break the chain of causation.

Global also seeks to assert a proposed economic interest defense to plaintiff's claim that it caused Novel and Access to breach the subject contracts. "In a contract interference case—as here—the ... defendant may raise the economic interest defense—that it acted to protect its own legal or financial stake in the breaching party's business." *White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422, 426 (2007). An economic interest defense can be asserted where the defendant, as here, is a corporate affiliate or agent of the breaching party. *See id.* Global bases this defense on its status as Novel's agent. *See* Dkt. 246 at 5; Dkt. 308 at 7. This defense,

¹⁸ Access does not claim that its own contractual insurance procurement role was delegated to DF. That would mean that DF was Access' agent (which is opposite of what Access argues, as such a contention would defeat its proposed defense, which is predicated on imputing DF's fault to Multibank).

therefore, is limited to the claim that Global caused Novel's breach, and shall not apply to the claim that Global caused Access' breach. The court will allow this limited defense, as Multibank's only objection is that this proposed defense was not disclosed in Global's response to Multibank's Bill of Particulars. *See* Dkt. 301 at 13. The court will not further opine on the viability of this defense, as its substantive merit is not challenged by Multibank at this time.

The remainder of the Besch Defendants' proposed amendments are allowed. Multibank does not dispute that the Besch Defendants are entitled to set off their liability with any recovery Multibank obtains from Covadonga or Novel (or any other collateral source). CPLR 4545(a); *see Bryant v New York City Health & Hosps. Corp.*, 93 NY2d 592, 607 (1999). Likewise, the Besch Defendants may defend Multibank's third-party beneficiary claims with the uncontroversial proposition that Multibank cannot assert rights greater than those available to the contracting parties. *See Renaissance Hous. Dev. Fund Corp. v Phoenix Const., Inc.*, 136 AD3d 605, 606 (1st Dept 2016). Finally, the Besch Defendants seek to withdraw "several affirmative defenses from the original complaint", and "[u]nsurprisingly, [Multibank] does not object to these changes." Dkt. 246 at 6; *see* Dkt. 249 (redline indicating withdrawn defenses). This request is granted. Accordingly, it is

ORDERED that Multibank's motion regarding the application of the Panamanian statute of limitations is granted, and the Besch Defendants' statute of limitations defense is dismissed with prejudice; and it is further

ORDERED that the Besch Defendants' motion to disqualify Multibank's counsel is denied as moot, and Multibank's cross-motion for sanctions is denied; and it is further

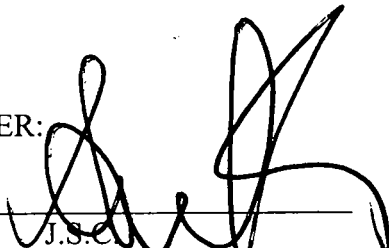
ORDERED that the Besch Defendants' motion for leave to file an amended answer is granted only to the extent that, within one week of the entry of this order, they may file an

answer in which: (1) Global asserts an economic interest defense to the claim that it tortiously interfered with the contracts between Multibank and Novel; (2) the Besch Defendants assert a set-off defense to ensure Multibank does not obtain a double recovery; (3) the Besch Defendants assert a defense to Multibank's third-party beneficiary claim that asserts that Multibank's rights under the subject contracts are no greater than those of the contracting parties; and (4) omits those defenses stricken in the redline version of the Besch Defendants' proposed amended answer; the Besch Defendants' motion for leave to amend is otherwise denied; and it is further

ORDERED that the parties shall promptly meet and confer on a deposition schedule and shall jointly call the court on April 30, 2018, at 5:00 p.m., to address disputes over who should be deposed and to set a schedule for the remainder of fact discovery.

Dated: April 23, 2018

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.