SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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QUADRIAD REALTY PARTNERS, LLC,45 WEST 36TH STREET, NEW YORK, NY 10018, DEVELOPMENT PLANNING & DESIGN INC.,45 WEST 36TH STREET, NEW YORK, NY 10018,

Plaintiffs,

- v -

WILBEE CORPORATION, 31-31 48TH AVENUE, LONG ISLAND CITY, NY 11101, KING KULLEN GROCERY CO., INC.,185 CENTRAL AVENUE, BETHPAGE, NY 11714, QUEENSBORO FARM PRODUCTS, INC.,156-02 LIBERTY AVENUE, JAMAICA, NY 11433, KAUFMAN BEDROCK ASTORIA I LLC,34-12 36TH STREET, ASTORIA, NY 11106, SILVERSTEIN PROPERTIES, INC.,7 WORLD TRADE CENTER, 250 GREENWICH STREET, 38TH FLOOR, NEW YORK, NY 10007, BEDROCK REAL ESTATE PARTNERS, LLC. 215 PARK AVENUE SOUTH, SUITE 2016, NEW YORK, NY 10003,

Defendants.

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INDEX NO. 153621/2018

MOTION DATE _____

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 423, 424, 425, 426, 427, 428, 433, 434, 435, 436, 437

were read on this motion for LEAVE TO AMEND INTERVENORS' COMPLAINT.

This case revolves around a real estate development project in Astoria, Queens – the Steinway Square Project (the "Project") – and the years-long odyssey to bring that Project to life. Thus far, however, the litigation of this case has been preoccupied with determining the right parties to prosecute the action. Now, having obtained a default judgment against erstwhile Plaintiffs Quadriad Realty Partners, LLC and Development Planning and Design, Inc. (the "Plaintiffs"), Plaintiffs-Intervenors Robert Gans ("Gans") and W&G Venture Holdings LLC ("W&G") (collectively, "Intervenors") seek leave to amend their Complaint to add, refine, and

reintroduce certain claims. For the reasons set forth below, Intervenors' motion is granted in part and denied in part.

RELEVANT BACKGROUND

Originally, Plaintiffs filed a Complaint alleging that they invested significant time and money shepherding the Project through an arduous regulatory process until Defendants[1] ousted them, usurping the benefits of Plaintiffs' hard work for themselves. *See* Original Compl., ¶¶1-4 (NYSCEF Doc. No. 1). The Plaintiffs' Complaint alleged three causes of action: (1) tortious interference with prospective business relations against Silverstein and Bedrock; (2) unjust enrichment against all Defendants; and (3) breach of an implied contract against all Defendants. *See id.*

Intervenors were granted leave to intervene in the case on June 21, 2018. *See* July 11, 2018 Decision and Order (NYSCEF Doc. No. 124). They alleged, essentially, that they had bought out Plaintiffs' interests in the Project and were therefore the rightful owners of all claims asserted by Plaintiffs against Defendants in this action. *See* Intervenors' Am. Compl., ¶74 (NYSCEF Doc. No. 135). Accordingly, the Intervenors' Complaint asserted a cross-claim against Plaintiffs seeking a declaratory judgment to that effect. *Id.*

In addition, the Intervenors asserted eight causes of action against Defendants: (1) intentional interference with contract against Silverstein and Bedrock; (2) intentional interference with prospective economic advantage against Silverstein and Bedrock; (3) unjust enrichment against Silverstein and Bedrock; (4) unfair competition against Silverstein and Bedrock; (5) idea

[1] "Defendants" refers collectively to Defendants Wilbee Corporation ("Wilbee"), King Kullen Grocery Co. Inc. ("King Kullen"), Queensboro Farm Products, Inc. ("Queensboro"), Kaufman Bedrock Astoria I LLC ("KBA"), Silverstein Properties, Inc. ("Silverstein"), and Bedrock Real Estate Partners, LLC ("Bedrock").

misappropriation against Silverstein and Bedrock; (6) promissory estoppel against Queensboro, King Kullen, and Wilbee; (7) declaratory judgment against all Defendants; and (8) preliminary and permanent injunction against all Defendants. *Id.*, ¶¶75-115.

Defendants moved to dismiss both the Plaintiffs' and Intervenors' Complaints, and on December 20, 2018, this Court (Bransten, J.) granted Defendants' motions in part. *See* NYSCEF Doc. No. 246 (the "Dec. 20 Decision and Order"). As relevant here, the Court dismissed Intervenors' claims for unfair competition, idea misappropriation, and for a preliminary and permanent injunction. *See id.* The Court also dismissed Plaintiffs' cause of action for breach of an implied contract, ruling that the allegations were "too vague and indefinite." *Id.*, at 16.[2]

The parties then proceeded to discovery, with a plan to first resolve the cross-claim between Plaintiffs and Intervenors, in order to determine who was the real party in interest against Defendants. That plan ran aground, however, when Plaintiffs stopped prosecuting their case. On April 25, 2019, the Court granted Plaintiffs' counsel's motion to withdraw from his representation of Plaintiffs, which stayed all proceedings for 30 days so that Plaintiffs could appear with new counsel by May 30. *See* NYSCEF Doc. No. 337. New counsel did not appear by that deadline, however, and have not appeared since. In July 2019, Intervenors and Defendants both moved for default judgments against Plaintiffs.

In a Decision and Order dated September 3, 2019, this Court granted those motions for default judgment against Plaintiffs. In granting Intervenors' motion, the Court entered a judgment in favor of Intervenors declaring that Intervenors are "the rightful owner[s] of 100% of the assets of W&G," and that Intervenors "are the owners of all claims asserted by Plaintiffs and

[2] Defendants and Intervenors filed Notices of Appeal from the December 20 Decision and Order. *See* NYSCEF Doc. Nos. 261, 263-66. Those appeals remain pending.

any recovery to Plaintiffs in this action must be turned over to [Intervenors]." NYSCEF Doc. No. 415. The Court then set a deadline for Intervenors to file a motion for leave to amend the Intervention Complaint, allowing Intervenors to add Plaintiffs' defaulted claims to their own. *Id.*[3] And that is, in part, what Intervenors seek to do with this motion. But Intervenors also seek to revive their own previously dismissed claims, on the basis of purported new evidence.

LEGAL ANALYSIS

I. Intervenors' Motion to Amend

Under CPLR 3025, a party may amend its pleadings "at any time by leave of court," and such "[l]eave shall be freely given," including "permit[ting] pleadings to be amended before or after judgment to conform them to the evidence." CPLR 3025(b)-(c). Deciding a motion for leave to amend requires a brush with the merits of the case, if only to discern whether the proffered amendments are "palpably insufficient or clearly devoid of merit." *Cruz v. Brown*, 129 A.D.3d 455, 456 (1st Dep't 2015). Indeed, the First Department "has consistently held that in order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated," so that "[l]eave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law." *Thompson v. Cooper*, 24 A.D.3d 203, 205 (1st Dep't 2005), citing *Davis & Davis, P.C. v. Morson*, 286 A.D.2d 584, 585 (1st Dep't 2001); *see also Walter & Rosen, Inc. v. Pollack*, 101 A.D.2d 734 (1st Dep't 1984) ("A

[3] The Court dismissed Plaintiffs' claims against Defendants "with prejudice as to Plaintiffs." NYSCEF Doc. No. 414. The Court's Order made clear, however, that the default judgment against Plaintiffs "in no way binds or prejudices *Intervenors* with respect to any arguments, claims, or defenses Intervenors may have against Defendants, and does not preclude Intervenors from seeking to assert, among other things, the Dismissed Claims in an amended Intervention Complaint." *Id.* (emphasis added).

motion for leave to amend calls upon the court to review the validity of any causes of action sought to be added.").

Moreover, leave to amend is properly denied when proposed new claims are "merely restatements" of previously dismissed claims. *Kassover v. PVP-GCC Holdingco II, LLC*, 73 A.D.3d 626, 629 (1st Dep't 2010) ("The motion court properly denied leave to amend the answer to assert counterclaims that were merely restatements of the previously dismissed counterclaims . . . [when] this Court have held that such alleged misconduct was protected by the business judgment rule[.]"); *Sutton Apartment Corp. v. Bradhurst 100 Dev. LLC*, 160 A.D.3d 508, 509 (1st Dep't 2018) (denying motion to amend complaint, "view[ing] the motion as plaintiffs' effort to reinstate previously-dismissed claims, which is not a proper use of a motion to amend"); *cf. Eshaghian v. Eshaghian*, 170 A.D.3d 416, 416 (1st Dep't March 5, 2019) (granting leave to amend where "proposed amendment is not palpably . . . devoid of merit" and "flows logically from the prior rulings in this case").

A. Unopposed Amendments to Intervenors' Complaint

Defendants do not oppose Intervenors' motion to the extent it seeks to (1) add claims which were not previously asserted in the Original Intervention Complaint, namely, Intervenors' expanded claim for unjust enrichment against defendants King Kullen, Wilbee, Queensboro, and KBA, and a breach of contract claim against Silverstein; (2) reassert a declaratory judgment claim against King Kullen, Wilbee, and Queensboro; and (3) withdraw Intervenors' promissory estoppel claim (the "Unopposed Amendments"). *See* Defs.' Opp. to Intervenors' Mot. for Leave to Amend, at 7 (NYSCEF Doc. No. 436).

The proposed additions are not palpably insufficient or clearly devoid of merit. Accordingly, Intervenors' unopposed motion as to these amendments is Granted.

B. Unfair Competition Against Silverstein and Bedrock

Next, Intervenors seek to reinstitute a claim for unfair competition against Silverstein and Bedrock, alleging that they "co-opted, misappropriated and usurped for themselves" the work of Gans, Quadriad, and Wollman (which are owned by Intervenors), "as well as the benefits flowing from Gans' time, effort and monetary investment." PAC, ¶142.

"It is well settled that the primary concern in unfair competition is the protection of a business from another's misappropriation of the business' organization [or its] expenditure of labor, skill, and money. . . . Allegations of a bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information can give rise to a cause of action for unfair competition." *Macy's Inc. v. Martha Stewart Living Omnimedia, Inc.*, 127 A.D.3d 48, 56 (1st Dep't 2015) (internal citations omitted). Such a claim requires "either a confidential relation between the parties or a valid agreement to refrain from the alleged unfair competition." *V. Ponte & Sons v. Am. Fibers Intl.*, 222 A.D.2d 271, 271 (1st Dep't 1995) (denying leave to interpose counterclaim for unfair competition); *Miller v. Walters*, 46 Misc. 3d 417, 427 (Sup. Ct. N.Y. Cty. 2014) (dismissing unfair competition claim where plaintiffs "do not allege that they compiled information and that such information was taken by [d]efendants for their own use") (Bransten, J.).

Previously, the Court dismissed Intervenors' unfair competition claim against Silverstein and Bedrock, holding that the relationship between the parties could not sustain such a claim:

> Here, the parties were involved in an arm's length business transaction, and the Gans Complaint does not allege any agreement to refrain from competing on these terms. That it might be morally or ethically troubling is insufficient. Moreover, Gans and W&G can cite no binding case law that would establish a confidential relationship based on the alleged facts.

Dec. 20 Decision and Order, at 19.

Intervenors insist that these defects have been remedied in the PAC. This time, Intervenors specifically allege that W&G and Silverstein entered a confidentiality agreement dated February 16, 2016 (the "Confidentiality Agreement"), which "confirmed the confidential relationship and the relationship of trust between W&G and Silverstein, whereby W&G would provide material to Silverstein with the expectation that the material would be used for no purpose other than to evaluate working with W&G and that Silverstein would not take and use such material to usurp the opportunity brought to it by W&G." PAC ¶60; *see generally id.* ¶¶58-65. As for Bedrock, Intervenors have inserted an allegation that "Wollman shared W&G's Project-related materials with Bedrock to allow Bedrock to conduct its due diligence on the Project, and (upon information and belief) Bedrock agreed to keep said materials confidential, and not to use them competitively against W&G." *Id.* ¶50.

Although the proposed claim against Silverstein does not fall neatly within the ambit of other unfair competition cases – W&G and Silverstein are not competitors in the usual sense, as they do not compete against each other in a commercial marketplace – the Court cannot at this stage say that the claim is palpably insufficient or clearly devoid of merit. Intervenors now allege a concrete agreement to maintain the confidentiality of information and not to use that information to W&G's disadvantage. Whether or not the Confidentiality Agreement ultimately substantiates Intervenors' claim, it is sufficient at this stage that Intervenors are proposing to allege "a confidential relation between the parties," *V. Ponte & Sons*, 222 A.D.2d at 271, and to allege Silverstein's bad-faith misappropriation or exploitation arising from that relationship. Given the broad scope of the tort of unfair competition, *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir. 1982), and the "heavy presumption of validity in favor of" permitting amendment when there is no prejudice to

Defendants from delay in asserting the claims, *see LDIR, LLC v. DB Structured Prod., Inc.*, 172 A.D.3d 1, 4 (1st Dep't 2019), this branch of Intervenors' motion to amend is granted.[4]

The proposed amendments as to Bedrock, however, are too conclusory to go forward. *Sapienza v. Becker & Poliakoff*, 173 A.D.3d 640, 640–41 (1st Dep't 2019) (denying motion for leave to amend complaint "since the proposed amended complaint added only conclusory allegations"). The newly-alleged confidential relationship with Bedrock consists of a single allegation, "upon information and belief," that Bedrock "agreed to keep said materials confidential." PAC, ¶50. Without more, this proposed claim fails for the same reasons set out in the Court's December 20 Decision and Order. *See Gluckman v. Laserline-Vulcan Energy Leasing, LLC*, No. 601687/08, 2009 N.Y. Slip Op. 33080(U), at *8 (Sup. Ct. N.Y. Cty. Dec. 17, 2009) ("Because the[ ] operative allegations are all alleged only 'upon information and belief,' the amended complaint is defective, and must be dismissed for that reason alone.").

Accordingly, the branch of Intervenors' motion to add a claim for unfair competition is Granted as to Silverstein and Denied as to Bedrock.

C. <u>Idea Misappropriation Against Silverstein and Bedrock</u>

Intervenors also propose to resurrect their claim for "idea misappropriation," a cause of action which "requires proof of two elements: (1) a legal relationship between the parties in the form of a fiduciary relationship, an express contract, implied contract, or quasi contract; and (2)

[4] Defendants' contention that "the Dismissal Order did not grant . . . permission to replead this claim," Defs.' Opp. to Intervenors' Mot. for Leave to Amend, at 9 (NYSCEF Doc. No. 436), is unavailing. "Since the judgment is silent as to 'prejudice,' it is deemed to be . . . without prejudice." *420 E. Assocs. v. Estate of Lennon*, 225 A.D.2d 326, 326 (1st Dep't 1996); *accord Gowen v. Helly Nahmad Gallery, Inc.*, 60 Misc. 3d 963, 978 (Sup. Ct. N.Y. Cty. 2018) ("[A]n order which is silent as to whether it is made with or without prejudice is deemed to have been made without prejudice.") (Bransten, J.), *aff'd*, 169 A.D.3d 580 (1st Dep't 2019). At any rate, this Court exercised its discretion to grant Intervenors leave to make the instant motion.

an idea that is novel and concrete." *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 29–30 (1st Dep't 2015). "[T]he idea misappropriation claim cannot extend to material in the public domain." *Id.* at 30. "Improvement of standard technique or quality, the judicious use of existing means, or the mixture of known ingredients in somewhat different proportions – all the variations on a basic theme – partake more of the nature of elaboration and renovation than of innovation." *Paul v. Haley*, 183 A.D.2d 44, 53 (2d Dep't 1992) (internal quotation marks and citations omitted).

The Court previously dismissed this claim for lack of novelty:

> Plaintiffs admit in their papers that both the New Strategy and the specific mixture of housing types therein, which Plaintiffs allege are the basis for the Steinway Square project, have been publicly available for years on Quadriad's website, and have been the subject of many public presentations. While Gans and W&G try to argue that the project is disassociated from those concepts, that argument is belied by the complaints. Because the elements of the project are publicly available, Gans and W&G may not bring an idea misappropriation claim.

Dec. 20 Decision and Order, at 20.

While "Intervenors acknowledge that [this Court] dismissed this cause of action for lack of novelty," Intervenors Br. at 17, they do not explain how the proposed claim corrects that deficiency. Indeed, Intervenors admit that "the allegations underlying [this] claim remain fundamentally the same." Intervenors Reply Br. at 4. Therefore, Intervenors' motion as to the idea misappropriation claim is Denied.

D. <u>Preliminary and Permanent Injunction Against All Defendants</u>

Finally, Intervenors seek a "preliminary and/or permanent injunction enjoining all of the Defendants from entering into a transaction with any third party that would have the purpose or effect of giving legal possession or development rights in connection with the Steinway Square Project to Silverstein, Bedrock, or any other party." PAC ¶159.

This Court dismissed the previous iteration of Intervenors' claim for a preliminary and permanent injunction for failure to allege irreparable, non-compensable harm:

> Here, Gans and W&G fail to allege why they cannot be adequately compensated by monetary damages. While Gans and W&G claim that they will suffer irreparable harm if their assets and information are exploited, as stated above the elements of the development strategy have been publicly available for years. Moreover, given the documentary evidence attached to the instant motions regarding the Steinway Square project's accounts and billing, among other things, any damages should be readily ascertainable. *See, e.g.*, *204 Columbia Heights, LLC v. Manheim*, 148 A.D.3d 59, 70-71 (1st Dep't 2017) (dismissing claim for permanent injunction due to existence of monetary damages).

Dec. 20 Decision and Order, at 22-23.

In moving to reintroduce this cause of action, Intervenors cite to two new allegations in the PAC. First, Intervenors allege that the Confidentiality Agreement between Silverstein and W&G "specifically identifies injunctive relief as the proper remedy for breach [thereof]." PAC, ¶160. Second, Intervenors assert that "permitting the Steinway Square Project to proceed unimpeded without the participation of Intervenors will deprive them of control over (or even participation in) the Project . . . and will also adversely impact Intervenors' professional reputation and brand, particularly in light of negative comments made by Silverstein concerning Intervenors' abilities to complete the Project." *Id.*, ¶161.

Neither of Intervenors' new allegations, however, show "why they cannot be adequately compensated by monetary damages," rendering the proposed amendment futile. *"J. Doe No. 1" v. CBS Broad. Inc.*, 24 A.D.3d 215, 216 (1st Dep't 2005) ("Leave to amend was properly denied since the proposed amendment . . . suffers from the same fatal deficiency as the original claims."). The contractual provision cited by Intervenors does not support the proposed claim. As an initial matter, the provision appears in a contract signed only by Silverstein, not the other Defendants. It is unclear why a breach of this contract would then justify imposing restrictions

on the business activities of other, non-contracting parties. In any event, the provision at issue does not state that a breach would result in irreparable harm. The provision, as written, reads as follows:

> You acknowledge and agree that remedies at law may be inadequate to protect the undersigned against a breach of the foregoing, and, in the event of such a breach, you hereby in advance consent and agree to the *seeking* of injunctive relief in favor of the undersigned without proof of actual damages.

PAC, Ex. 11 (emphasis added) (NYSCEF Doc. No. 426). The word "seeking" appears in a text box, with an arrow indicating that it should replace the word "granting." *Id.* That kind of equivocal language does not, in the Court's view, change the previous finding that "given the documentary evidence . . . regarding the Steinway Square project's accounts and billing, among other things, any damages should be readily ascertainable." Dec 20 Decision at 22; *see LDC USA Holdings, Inc. v. Taly Diamonds, LLC*, 121 A.D.3d 529, 530 (1st Dep't 2014) (affirming denial of preliminary injunction, noting that "[c]ontrary to plaintiff's contention, the provision in the operating agreement entitling a party to specific performance in the event of the other's breach does not render the alleged harm irreparable").

In addition, Intervenors' reference to an "adverse[ ] impact" on its "professional reputation," without more, is an insufficient basis for injunctive relief. *Mabry v. Neighborhood Def. Serv., Inc.*, 88 A.D.3d 505, 506 (1st Dep't 2011) ("[A]bsent extraordinary circumstances, feelings of degradation and humiliation and damage to reputation and self-esteem do not constitute irreparable harm for the purposes of injunctive relief."); *John G. Ullman & Assocs., Inc. v. BCK Partners, Inc.*, 139 A.D.3d 1358, 1359 (4th Dep't 2016) (denying request for preliminary injunction where "plaintiff asserted in support of the motion that it would suffer some unspecified damage to its 'goodwill and reputation,'" which 'd[id] not establish that irreparable harm will result in the absence of injunctive relief'").

Therefore, Intervenors' motion with respect to this proposed claim is Denied.

II. Defendants' Cross-Motion for a Stay of Discovery

In their cross-motion, Defendants urge that "in the event the Court grants Intervenors' motion to amend, a limited stay of discovery is required in order to obviate the waste of time, money, and judicial resources which will be hemorrhaged." Defs.' Opp. to Intervenors' Mot. for Leave to Amend, at 13. The cross-motion is denied.

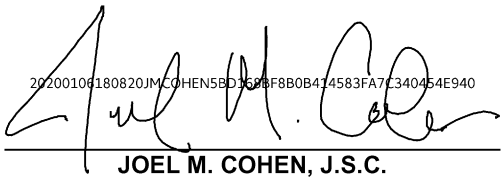
As Intervenors rightly note, "it is the presumption of the Commercial Division that discovery continues during motion practice." *In Re Dentsply Sirona, Inc. v XXX*, No. 155393/2018, 2019 WL 3526142, at *6 (Sup. Ct. N.Y. Cty. Aug. 02, 2019); *Hartman v Snellen*, No. 6538692013, 2014 WL 7876752, at *1 (Sup. Ct. N.Y. Cty. Sep. 17, 2014) (denying motion for stay of discovery pending motion to dismiss because "defendants filing motions to dismiss presumably deem them meritorious" and "if the filing of a motion to dismiss were sufficient to impose a stay, there would be no Rule 11(d)"). What Defendants describe as "a limited stay of discovery" – but with no definite timeframe – would delay this case unnecessarily. Therefore, Defendant's cross-motion is Denied.

* * * *

Accordingly, it is

ORDERED that Intervenors' motion is Granted with respect to the Unopposed Amendments and the unfair competition claim against Silverstein and is otherwise Denied; and Defendants' cross-motion is Denied.

This constitutes the Decision and Order of the Court.



1/6/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE