TO BE FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRESCIENT ACQUISITION GROUP, INC.
d/b/a Prescient Capital Corp.,

Plaintiff,

Case No.: 05 CV 6298
(PKC)(AJP)
ECF Case

-against-

ORAL ARGUMENT REQUESTED

MJ PUBLISHING TRUST, MJ-ATV PUBLISHING TRUST, NEW HORIZON TRUST and MICHAEL J. JACKSON

Defendants.

MEMORANDUM OF LAW OF DEFENDANTS MJ PUBLISHING TRUST, MJ-ATV PUBLISHING TRUST AND MICHAEL J. JACKSON IN SUPPORT OF THEIR MOTION TO AMEND THE ANSWER

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STATUTE

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Defendants MJ Publishing Trust, MJ-ATV Publishing Trust and Michael J. Jackson ("MJ Defendants") submit this Memorandum of Law, as well as the supporting Declaration of Desmond C. Whitaker dated January 2, 2007, in support of their Motion to Amend the Answer to assert an affirmative defense under New York General Obligations Law § 5-531. For the reasons set forth herein, the MJ Defendants respectfully request that pursuant to Federal Rules of Civil Procedure 15(a) and 16(b), this Court grant MJ Defendants leave to amend the Answer to add an affirmative defense of New York General Obligations Law § 5-531.

I. THE DEPOSITION OF MR. DARIEN DASH ON OCTOBER 20, 2006

Plaintiff, Prescient Acquisition Group, Inc., brought this civil action against MJ Defendants seeking compensation for the alleged "financial advisory services" of Plaintiff's *sole* founder, *lone* principal and *only* employee—Mr. Darien Dash. Throughout this case, Mr. Dash claimed to be the "exclusive financial advisor" to MJ Defendants in the winter of 2004-05.

On October 20, 2006, counsel for MJ Defendants deposed Mr. Dash as the key witness for Plaintiff.[1] During Mr. Dash's deposition, counsel questioned him extensively regarding:

(1) his education and training in finance;

(2) his alleged companies, Prescient Capital Corporation and Prescient Acquisition Group, Inc.;

(3) his typical "financial advisory services" in similar refinancing deals;

(4) his understanding of his role as "exclusive financial advisor"; and

(5) the actual work that he performed during the winter of 2004-05.

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[1] For the Court's convenience, Mr. Dash's deposition transcript is attached to the Declaration of Desmond C. Whitaker. See Whitaker Declaration Ex. A ("Dash Dep.").

Throughout his deposition, Mr. Dash made admissions on each of these topics, which together revealed that Mr. Dash was, by his own version of the facts, nothing more than an unauthorized loan broker. In fact, Mr. Dash's deposition testimony painted himself as a *classic* loan broker.

A. Mr. Dash Lacked Necessary Expertise in Finance

First, Mr. Dash's deposition testimony revealed that, while he is a businessman with connections, he lacked necessary expertise in finance. Mr. Dash was a political science major. See Dash Dep. 11-12. He had no formal advanced training in finance. See id. From the beginning, Mr. Dash simply made introductions to others more experienced in finance. See Dash Dep. 62 ("Carl Douglas . . . was the first person that I thought to call in regard to this transaction given that he had a wealth of experience."). Mr. Dash's lack of training, and dependence on others, shows he was in no position to act as an "exclusive financial advisor."

B. Mr. Dash Created Two Corporate Shells to Collect Loan Broker Fees

Second, Mr. Dash's testimony shows that his two companies were *not* "exclusive financial advisor" firms, but corporate shells created to collect fees as loan brokers. Mr. Dash founded "Prescient Capital Corporation" around "the fall of 2004" — the eve of his alleged agreement with MJPT. See Dash Dep. 22-23. "Prescient Capital Corporation's" "office" was in Mr. Dash's home. See Dash Dep. 23. Prescient Acquisition Group, Inc.'s only "business address" is an agent's office in Manhattan. See Dash Dep. 15-18. Its sole "employee" has been Mr. Dash. See Dash Dep. 14. These were not legitimate "financial advisor" firms.

C. Mr. Dash's Typical "Financial Advisory Services" Are to Function As a Loan Broker

Third, Mr. Dash's testimony revealed that his standard "financial advisory services" in the financing context are, in fact, loan broker functions. When Mr. Dash was pressed about his typical role in financing projects, Mr. Dash's response describes a *classic* loan broker:

Q When you speak of financing, are you actually providing the capital or are you acting as an intermediary between a lender and a borrower or something else?
A An intermediary.
Q Has Prescient Acquisition Group ever done anything in the financing realm other than act as an intermediary?
A I don't understand the question.
Q In any of the financing deals has it ever done anything other than act as an intermediary between the parties?
A No.
. . . .
Q What do you understand the term intermediary to be?
A Somebody who introduces opportunities to capital.

See Dash Dep. 45-47 (emphasis added). As shown below, Mr. Dash's response tracks the statutory definition of a "loan broker" under New York law. See infra Point II.D.

D. Mr. Dash Understood That His Role Was to Be a Loan Broker

Fourth, Mr. Dash's testimony revealed that he understood his own role was to be a loan broker. Regarding the alleged title "exclusive financial advisor," Mr. Dash testified that he included it simply to keep others from making a claim for fees for his purported introductions:

Q Turning your attention to the November 17, 2004 agreement, you mentioned earlier that you were supposed to serve as the exclusive financial adviser in your terms and not legally. What was your understanding of that?
A I was going to start the process and bring the parties that I brought in, Transitional and Fortress, and then not have somebody at the 11th hour show up and say that they were in fact doing the deal with them . . . .
That was the purpose to avoid that scenario and to make the other parties that I introduced comfortable that wouldn't happen.

See Dash Dep. 203-204 (emphasis added). Mr. Dash understood his "role was to seek an institution" for loan refinancing. See Dash Dep. 204 (emphasis added). In short, Mr. Dash understood that his role was essentially a loan broker.

E. Mr. Dash's Purported Work Amounted to Acting as a Loan Broker

Fifth, Mr. Dash's testimony about the *actual* work he purportedly performed further demonstrated that he acted as a loan broker. Mr. Dash uses buzzwords to make his role sound more grandiose. However, whenever counsel pressed Mr. Dash about his *actual* work, he describes a loan broker. Under his own version of the facts, Mr. Dash made introductions.

As Mr. Dash succinctly stated:

> A It's my position that I introduced the parties that are in this lawsuit to Fortress and Transitional, and that Fortress ultimately financed the transaction and that under my agreement I am due a fee in exchange for that introduction.
> That's all I am bringing. Nothing else.

See Dash Dep. 198 (emphasis added). In fact, Mr. Dash's purported actions often do not rise to the level of a loan broker. For example, Mr. Dash testified in his deposition that it was "Carl Douglas who introduced me to Stuart Shelly and Dean Dakolias who was principal [sic] of Fortress . . . ." See Dash Dep. 186 (emphasis added).

F. MJPT Sought Leave to Amend the Answer on November 21, 2006

Mr. Dash's deposition made clear that Mr. Dash was *not* an "exclusive financial advisor," as Plaintiff has maintained throughout these proceedings. Nor had Mr. Dash provided any meaningful "financial advisory services," as Plaintiff has alleged all through this case. These were shams for a loan brokerage. Mr. Dash's own testimony presented a classic loan broker.

MJ Defendants briefly considered filing suit against Plaintiff under New York General Obligations Law § 5-531 ("Section 5-531"). However, because MJ Defendants had not paid any fees to Plaintiff, the claim was not ripe, and MJ Defendants preferred to resolve its disputes in one case. On November 21, 2006, MJ Defendants requested a conference to seek leave to amend to assert an affirmative defense under Section 5-531. See Letter of L. Londell McMillan to the Court (Nov. 21, 2006).

II. ARGUMENT

A. Standard of Review

Leave to amend "shall be freely given when justice so requires . . . ." See Foman v. Davis, 371 U.S. 178, 182 (1962) (citation omitted). If the underlying facts may support relief the movant "ought to be afforded an opportunity to test his claims on the merits." Foman, 371 U.S. at 182 (quoted in United States v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago, 889 F.2d 1248, 1255 (2d Cir. 1989) (reversing as an abuse of discretion the district court's denial of defendant's motion to amend answer to assert affirmative defense)).

Because of the strong preference for deciding cases on their merits, it is "rare for an appellate court to disturb a district court's discretionary decision to allow amendment." Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 333 (2d Cir. 2000) (affirming district court's decision granting defendant leave to amend answer after a seven year delay). The Second Circuit is particularly liberal in allowing defendants leave to raise meritorious defenses: district courts may construe a defendant's motion for summary judgment as a motion to amend the answer, and then grant leave to amend. See Anthony v. City of New York, 339 F.3d 129, 138 n.5 (2d Cir. 2003) (affirming district court's decision allowing defendants leave to amend answer to assert affirmative defense raised for the first time on summary judgment).

B. MJPT's Motion to Amend Should Be Considered on its Own Merits

MJ Defendants' motion to amend its Answer should be judged on its own merits without regard to the denial of Plaintiff's fourth motion to amend. Contrary to Plaintiff's belief, motions are *not* decided on a "tit for tat" basis between the parties. See Spolnik v. Guardian Life Ins. Co. of Am., 94 F. Supp. 2d 998, 1009 (S.D. Ind. 2000); see also Price, Heneveld, Cooper, Dewitt & Litton v. Annuity Investors Life Ins., No. 04-CV-0561, 2006 WL 696480, at *3 (W.D. Mich.

Mar. 17, 2006) ("Plaintiff argues unconvincingly that merely because the court denied its motion it must also deny Defendant's."). Rather, the Court "must evaluate each motion for leave to amend the pleadings on its own merits." See Spolnik, 94 F. Supp. 2d at 1009 (emphasis added).

District courts in the Second Circuit certainly may deny a plaintiff's leave to amend the complaint, while granting the defendant's leave to amend the answer. See Noble v. Murphy, No. 01-CV-406A, 2004 WL 2091993, at *1 (W.D.N.Y. Sept. 17, 2004) (denying plaintiff's motion to amend complaint, while granting defendant's motion to amend answer).[2] MJ Defendants' meritorious motion in this case should not be denied simply because, after amending its complaint three times, Plaintiff's *fourth* motion was denied. One motion has nothing to do with the other.

Even if Plaintiff's motion was relevant to MJ Defendants' motion, the two motions are readily distinguishable. First, in contrast to Plaintiff (who literally did not proffer *any* "good cause" in its motion to amend), MJ Defendants have ample good cause based on: Mr. Dash's admissions in his October 20, 2006, deposition, *and* to avoid filing a wasteful second suit in New York. See infra Point II.C.

Second, while the Plaintiff's motion would have required significant discovery, here, MJ Defendants' motion to amend is based on Plaintiff's own actions in the winter of 2004-05 and the Plaintiff's deposition testimony about its activities. Plaintiff obviously already has this information in its possession, and requires no new discovery. Moreover, Plaintiff has already conducted *profuse* discovery into the loan transactions for its fraudulent conveyance claim. See infra Point II.E.

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[2] See also Deere & Co. v. MTD Holdings, No. 00 Civ. 5936, 2003 WL 22439778, at *1 (S.D.N.Y. Oct. 28, 2003) (denying the plaintiff leave to amend the complaint while granting the defendant leave to amend the answer); Besicorp Group, Inc. v. Thermo Electron Corp., No. 90-CV-434, 1993 WL 105163, at *1 (N.D.N.Y. April 6, 1993) (same); Law v. Cullen, 613 F. Supp. 259, 263 (S.D.N.Y. 1985) (same).

Third, while Plaintiff's proffered theory was unsupported by the evidence, MJ Defendants' Section 5-531 defense is a statutory right codifying a strong public policy of New York. As shown below, this case is *controlled* by the New York Court of Appeals' leading decision of Fischer v. Panasian Commc'ns, 87 N.Y.2d 958, 664 N.E.2d 501 (N.Y. 1996) ("*Fischer*"). See infra Point II.D. Justice requires MJ Defendants be given the opportunity to have its meritorious defense decided under the controlling precedent of the New York Court of Appeals.

C. There is Good Cause and No Undue Delay

The decision whether to grant leave for "good cause" after the pretrial order "rests within the discretion of the Court and should be granted when 'the interests of justice make such course desirable.'" Bayonne v. Pitney Bowes, Inc., No. 3:03CV712, 2004 WL 169285, at *2 (D. Conn. Jan. 12, 2004) (quoting Madison Consultants v. Fed. Deposit Ins. Corp., 710 F.2d 57, 62 n.3 (2d Cir. 1983). When making such a determination, the court "should balance 'the need for doing justice on the merits' against judicial efficiency." Bayonne, 2004 WL 169285, at *2 (quoting Laguna v. Am. Exp. Isbrandtsen Lines, Inc., 439 F.2d 97, 101 (2d Cir. 1971)).[3] Here, both the interests of justice *and* judicial efficiency weigh in favor of granting leave to amend.

1. There is "good cause" to amend when the deposition of a key witness brings new defenses to light

Here, there is good cause to amend in light of the admissions Mr. Dash made in his October 20, 2006 deposition. See supra Point I. Mr. Dash—the Plaintiff's *sole* founder, principal and employee—was the key witness for the Plaintiff. Throughout this case, Plaintiff maintained that Mr. Dash was an "exclusive financial advisor" who performed "financial advisory services" for MJ Defendants.

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[3] Because Defendant's "good cause" and "undue delay" arguments are substantially similar in this case, they are briefed together in this section.

Mr. Dash's deposition testimony revealed that these assertions were incorrect at best. Mr. Dash's own admissions demonstrate overwhelmingly that: (1) he lacked necessary expertise in finance; (2) he created two corporate shells to collect loan broker fees; (3) his typical "financial advisory services" are to function as a loan broker; (4) he understood his role to be essentially a loan broker; and (5) his specific actions amounted to acting as a loan broker. See supra Point I. MJ Defendants' counsel diligently sought leave to amend the Answer after Mr. Dash's deposition.

Under such circumstances, the Second Circuit and its district courts hold that there is good cause and no undue delay. See Friedl v. City of New York, 210 F.3d 79, 88 (2d Cir. 2000) (reversing denial of leave to amend where the amendment was proposed after discovery revealed additional facts and the proposed changes were minimal); Permatex, Inc. v. Loctite Corp., No. 03 Civ. 943 LAK GWG, 2004 WL 1354253, at *3 (S.D.N.Y. June 17, 2004) (finding "good cause" to amend where defendant moved to amend answer 58 days after it deposed key plaintiff witness); Topps Co., Inc. v. Cadbury Stani S.A.L.C., No. 99 Civ. 9437 (CSH)(GWG), 2002 WL 31014833, at *3 (S.D.N.Y. Sept. 10, 2002) (finding "good cause" to amend where plaintiff "raised with the Court its desire to move to amend the complaint" on June 21, 2002, based on depositions with key witnesses in May 2002); Xpressions Footwear Corp. v. Peters, No. 95 Civ. 8243, 1995 WL 758761, at *2 (S.D.N.Y. Dec. 22, 1995) ("The federal courts consistently grant motions to amend where it appears that new facts and allegations were developed during discovery, are closely related to the original claim, and are foreshadowed in earlier pleadings.").

This rule is particularly true for Section 5-531—a usury statute—which Plaintiff has evaded through the sham that it was an "exclusive financial advisor" providing "financial advisory services." See supra Point I. As the Second Circuit has explained, loan brokers cannot

"evade the usury statute by a disguise," and courts should "never permit a form to shield illegality or statutes to be evaded by a sham or pretense." See Topping v. Trade Bank of N.Y., 86 F.2d 116, 117-18 (2d Cir. 1936) (granting injunction under predecessor to Section 5-531 where defendant received disguised bonus above the fee cap for procuring a loan) (citing Schanz v. Sotschenck, 160 A.D. 798, 800, 145 N.Y.S. 778, 780 (1st Dep't 1914) ("In the great majority of usurious transactions, a subterfuge of one kind or another is resorted to for the purpose of giving it a legal appearance. Such appearance, however, never deters the court from pronouncing the transaction usurious, once that fact appears.")).[4]

2. There is "good cause" to amend when the movant is diligently trying to avoid having to file a second lawsuit

Second, there is "good cause" where MJ Defendants are diligently seeking to resolve its disputes with Plaintiff in one action. Section 5-531 may be asserted as a claim or an affirmative defense, but does not accrue as a claim until the loan broker has taken fees exceeding the cap. See Fischer, 87 N.Y. 2d at 960, 664 N.E.2d at 502 (allowing counterclaim where defendant had previously paid some excess fees). While MJ Defendants dispute any fees, if leave is not granted to assert Section 5-531 as a defense, and MJ Defendants are forced to pay Plaintiff excess fees, it will have to file a wasteful second lawsuit.

Therefore, the interests of judicial efficiency weigh in favor of granting leave to amend. See Bayonne, 2004 WL 169285, at *2. Courts in the Second Circuit find "good cause" where the movant is diligently trying to avoid a wasteful second lawsuit. See BICC Cables Corp. v. Scott & Scott, LLC, No. 3:04-CV-1545 (RNC), 2006 WL 860099, at *3 (D. Conn. Mar. 31,

[4] See also Pan Am. World Airways, Inc. v. Shulman Transp. Enter., 744 F.2d 293, 295 (2d Cir. 1984) (holding courts should judge transaction by its "real character rather than the form and color that the parties have given it" and that a "usurious loan is not made lawful by falsely terming it a sale . . . or a corporate obligation").

2006) (holding "motion to amend filed by the Scott defendants is granted, for good cause, to enable the parties to fully resolve their dispute in one forum").[5]

D. Plaintiff Cannot Show Futility

Plaintiff cannot show that MJ Defendants' amendment would be futile. The Second Circuit holds that if the movant has "at least colorable grounds for relief . . . justice requires" leave be granted. See Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 783 (2d Cir. 1984); see also UMG Recordings v. Lindor, No. CV-05-1095(DGT), 2006 WL 3335048, at *2 (E.D.N.Y. Nov. 9, 2006) (holding court "need not finally determine the merits of the . . . defense but merely satisfy itself that it is colorable and not frivolous") (citations omitted).

Here, by Mr. Dash's own deposition testimony, Section 5-531 applies precisely to his action in the winter of 2004-05. Section 5-531 provides that:

> No person shall, directly or indirectly, take or receive more than fifty cents for a brokerage, soliciting, driving or procuring the loan or forbearance of one hundred dollars, and that proportion for a greater or less sum, except loans on real estate security; nor more than thirty-eight cents for making or renewing any bond, bill, note or other security given for such loan or forbearance; or for any counter bond, bill, note or other security concerning the same.

See N.Y. Gen. Oblig. § 5-531(1) (emphasis added). The statute defines a "loan broker" as "any individual, firm, corporation or partnership who agrees for a fee to obtain a loan or credit for a consumer or to assist a consumer in obtaining a loan or credit, other than a loan or credit on real estate security." See N.Y. Gen. Oblig. § 5-531(2)(b). By Mr. Dash's own admissions, he squarely fits these definitions. See supra Point I.

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[5] See also Topps, 2002 WL 31014833, at *3 (finding "good cause" to amend where a "compelling argument could be made that there will be a loss of judicial economy if Topps is required to initiate a second action"); Lobo Recording Corp. v. Waterland, 197 F.R.D. 23, 27 (E.D.N.Y. 2000) (granting defendants leave to amend after discovery was complete where the "claims could always be brought by the Defendants in a new lawsuit in which [plaintiff] would have to pursue the exact same discovery in any event").

The New York Court of Appeals has enforced Section 5-531 on facts remarkably similar to this case. In Fischer v. Panasian Commc'ns, 87 N.Y.2d 958, 960, 664 N.E.2d 501, 502 (N.Y. 1996), the individual defendants were two family members who owned several companies, including Panasian Communications, Inc., and a realty company named Pako Realty. See Fischer, 87 N.Y.S. at 960, 664 N.E.2d at 501. One of the defendants agreed to pay the plaintiff a fee of $300,000 "if plaintiff successfully arranged a loan of $1.6 million for [the individual defendants], or any of the companies in which the individuals had an equity participation, including Panasian Communications." Fischer, 87 N.Y.2d at 960, 664 N.E.2d at 502.

The plaintiff reviewed financial statements of the defendants, introduced the defendants to representatives of Chase Manhattan Bank, and negotiated the terms of the loan.[6] The Court of Appeals described the loan financing as follows:

> Thereafter, [plaintiff] procured a $1.75 million loan for Panasian Communications, Inc. from Chase Manhattan Bank to finance Panasian's acquisition of a television station. The loan to Panasian was guaranteed by a number of corporate defendants controlled by [the individual defendants], including Pako Realty, Inc., which granted a mortgage to Chase on real property as part of its security for its guarantee.

Id. Although the plaintiff was due fees of over $300,000 under its contract with the defendants, the Court of Appeals held that Section 5-531 applied and capped fees at $8,000. See id.

In so ruling, the Court of Appeals rejected the plaintiff's argument that Section 5-531 did not apply to private placement transactions with institutional lender-investors. See Fischer, 664 N.E.2d at 501 ("Similarly unavailing is plaintiff's argument that section 5-531 does not apply to private placement transactions between corporate borrowers and large institutional investors. Section 5-531 makes no express distinction between individual and corporate borrowers . . .

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[6] See Brief for Plaintiff-Appellant, Fischer v. Panasian Communc'ns, No. 1995-0571, WL 17050938, at **5-11 (1995); see also Brief for Defendants-Respondents, No. 1995-0571, 1995 WL 17050936, at **4-8 (1995).

Nor is there evidence of an intent to limit the scope of section 5-531 to consumer transactions . . . .").[7] Given the *Fischer* precedent, MJPT's amendment is "colorable" and meritorious.

E. Plaintiff Cannot Establish Undue Prejudice

Plaintiff cannot establish undue prejudice. Plaintiff has the burden of showing that granting leave will be unduly prejudicial which "requires the nonmovant to do more than simply claim to be prejudiced." See Trudeau v. N.Y. State Consumer Protection Bd., Civ. No. 1:05-CV-1019 (GLS/RFT), 2006 WL 1229018, at *4 (N.D.N.Y. May 4, 2006) (quotations omitted). It is well-established that "a conclusory assertion of prejudice by the party opposing amendment . . . is not sufficient to preclude the party seeking to amend . . . ." Nicholas v. Westchester Resco Co., No. 90 Civ. 2495, 1992 WL 30575, at *3 (S.D.N.Y. Jan. 31, 1992).

1. No additional discovery is necessary

Here, MJ Defendants' motion to amend cites Plaintiff's own admissions about its own actions in the winter of 2004-05. Plaintiff and Mr. Dash do not need third persons to tell them what Mr. Dash's own actions were. See Innocent v. HK Hotels, LLC, No. 05 CIV. 6057(JCF), 2006 WL 2289809, at *4 (S.D.N.Y. Aug. 9, 2006) (granting leave to amend where non-movant "controls the pay records, witnesses, and information about the scope of its employees' duties, [non-movant] will not require substantial supplement discovery from the plaintiff"); DuFour-Dowell v. Cogger, 969 F. Supp. 1107, 1111 (N.D. Ill. 1997) (granting leave to amend because a non-movant "does not need discovery into his own conduct"). Plaintiff may be unhappy with Mr. Dash's deposition, but it cannot now contradict or put a different gloss on his sworn testimony. See Raskin v. Wyatt Co., 125 F.3d 55, 63 (2d Cir. 1997) (rejecting a new affidavit

[7] The Court of Appeals further rejected the plaintiff's assertion of the real estate exception under Section 5-531. See Fischer, 87 N.Y.2d at 960, 664 N.E.2d at 502.

"that, by omission or addition, contradicts the affiant's previous deposition testimony") (citations omitted).

Moreover, Plaintiff has already conducted *copious* discovery into the loans for its fraudulent conveyance claim. Plaintiff has *all* of the closing documents for *each* of the relevant loans. Plaintiff deposed *two* Fortress representatives *and* the closing attorney. In cases such as this, when similar discovery has already been conducted, courts reject claims of undue prejudice. See United States v. Livecchi, No. 03-CV-6451P, 2005 WL 2420350, at *18 (W.D.N.Y. Sept. 30, 2005) (holding no undue prejudice in granting defendant leave to amend after deadline because no additional discovery would be required on similar issues); Spanierman Gallery v. Merritt, No. 00 Civ. 5712(THK), 2004 WL 1488118, at *2 (S.D.N.Y. June 30, 2004) ("The Court cannot foresee the need for further discovery as a result of the proposed counterclaim, since Plaintiff has already deposed Defendant with respect to virtually all matters pertinent to her proposed counterclaim . . . .").[8]

2. The Court must balance the merits with any minimal burdens

Even if Plaintiff could come up with some additional discovery—which it cannot—that alone is insufficient to deny leave. The Second Circuit holds that the "adverse party's burden of undertaking discovery, standing alone, does not warrant denial of motion to amend pleading." See United States on behalf of Maritime Admin v. Continental Illinois Nat'l Bank & Trust Co., 889 F.2d 1248, 1252 (2d Cir. 1989) (reversing denial of motion to amend where plaintiff failed to show undue prejudice). Even if Plaintiff could show leave "would result in significant

[8] See also In re Vitamins Antitrust Litig., 217 F.R.D. 30, 34 (D.D.C. 2003) (granting leave to amend after discovery ended in light of the "extensive discovery already taken" on similar issues to the proposed amendment); Zoll v. Jordache Enter., Inc., No. 01 CIV. 1339(CSH), 2002 WL 485733, at *2 (S.D.N.Y. Mar. 29, 2002) (granting defendant leave to amend answer after discovery to add statute of limitations defense where laches issue was present); Morlock v. West Cent. Educ. Dist., 46 F. Supp. 2d 892, 913-14 (D. Minn. 1999) (stating non-movants "have already deposed [movant's] witnesses at length and can point to no specific evidence that they would seek to obtain on the basis of [movant's] amendment, had she proposed it earlier, that they have not already acquired").

additional discovery . . . this by itself is insufficient prejudice to deny leave to amend, particularly when trial has not commenced and is unlikely to for some time." R.B. Williams Holding Corp.v. Ameron Int'l Corp., No. 97-CV-0679E(H), 1998 WL 799155, at *2 (W.D.N.Y. Nov. 2, 1998) (quoting S.S. Silberblatt, Inc. v. East Harlem Pilot Block Bldg. 1 Housing Dev. Co., 608 F.2d 28, 42 (2d Cir. 1974).

Discovery could be easily supplemented. The trial is more than six months away. On such facts, there is no undue prejudice. See R.B. Williams Holding Corp., 1998 WL 799155, at *2 (granting leave where court found "minimal, if any, additional discovery will be required").

Moreover, "[a]ny prejudice which the non-movant demonstrates must be balanced against the court's interest in litigating all claims in a single action and any prejudice to the movant which would result from a denial of the motion." Saxholm AS v. Dynal, Inc., 938 F. Supp. 120, 123 (E.D.N.Y. 1996) (holding that "denying leave to amend would simply multiply proceedings in this court with no apparent benefit to the parties"). Justice and efficiency require that MJ Defendants has its meritorious Section 5-531 defense heard on the merits in this case.

III. CONCLUSION

For the reasons stated above, the Court should grant MJ Defendants' motion to amend the Answer to assert an affirmative defense under New York General Obligations Law § 5-531.

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Respectfully submitted,

THE MCMILLAN FIRM

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