SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED PART 60
HON. BERNARD J. FRIED Justice

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Mutual Benefits Offshore Fund,

Plaintiffs,

-against-

Zeltser, Emanuel, et. al.,

Defendants.

---x

Index No. #650438/2009

MOTION DATE

MOTION SEQ. NO. #011

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the attached memorandum decision, the motion by counterclaim-defendants–Triangle International Management, Ltd., Amicorp Curacao B.V., Investarit AG, Meridian Asset Management Ltd., and Mutual Trust SA to vacate the default judgment is granted on condition that these counterclaim-defendants serve and file answers to the counterclaims herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that counterclaim-defendants shall serve a copy of this order with notice of entry on the County Clerk (Room 141B) and upon the Trial Support Office (Room 158); and it is further

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

ORDERED that counsel are directed to appear for a status conference in Room 248 on May 3, 2012 at 11:00 a.m.

SO ORDERED.

Dated: 3/30/2012

HON. BERNARD J. FRIED
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST [ ] REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER/JUDG.

MEMORANDUM DECISION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

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MUTUAL BENEFITS OFFSHORE FUND,

Plaintiff,

-against-

Index No. 650438/2009

EMANUEL ZELTSER, ET AL.,

Defendants.

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APPEARANCES:

For Plaintiff Mutual Benefits Offshore Fund:

Gusrae Kaplan Nusbaum, PLLC
120 Wall Street
New York, New York 10005
By: Martin P. Russo, Esq.
Sarah Y. Khurana, Esq.

For Defendants Mark Zeltser, M.E. Seltser, P.C., and Interel Corp., and Defendant/ Counterclaim-Plaintiff Joseph Kay:

Law Offices of Bruce D. Katz & Assocs.
160 Broadway
New York, New York 10038
By: Bruce Katz, Esq.

For Proposed Intervenors Kayley Investments Ltd. and Imedinvest Trust:

The Abramson Law Group PLLC
570 Lexington Ave.
New York, New York 10022
By: David S. Abramson, Esq.
Mitchell Shenkman, Esq.

For Defendant Emanuel Zeltser and Defendant/Counterclaim-Plaintiff Sternik & Zeltser, P.C.:

Sternik & Zeltser P.C.
119 West 72nd Street, Suite 229
New York, New York 10023
By: Emanuel Zeltser, Esq.

For Counterclaim-Defendants Triangle International Management, Ltd., Amicorp Curacao B.V., Investarit AG, Meridian Asset Management Ltd., and Mutual Trust SA:

Sims Moss Kline & Davis LLP
129 Third Street
Mineola, New York 11505
By: Michael P. Gilmore, Esq.

Fried, J.:

Before me are three motions, consolidated for disposition: (Seq. No. 011) a motion by the defaulted counterclaim-defendants to vacate the default judgment; (Seq. No. 012) a motion to intervene by third parties; and (Seq. No. 013) a motion by defendants to vacate the Note of Issue.

A short description of the pleadings is in order.

According to the complaint, the business purpose of plaintiff Mutual Benefits Offshore Fund ("MBOF") was to invest in death benefits of life insurance policies through a brokerage house called Mutual Benefits Corp. ("MBC"). In 2004, MBC was placed in SEC receivership for alleged misconduct. MBOF's largest investor was Test Trust, through its wholly owned investment company Kayley Investments NV ("Kayley"). Defendant Joseph Kay was one of Test Trust's two trustees. Kay persuaded MBOF in 2006 to retain defendants Emanuel Zeltser ("Zeltser" or "Emanuel Zeltser") and his law firm, Sternik & Zeltser ("S&Z"), as counsel to help recover the funds it had invested in MBC. Zeltser and S&Z recovered funds totaling $4.3 million but have not returned them to MBOF. They put the money into an escrow account, making misrepresentations to MBOF that it was necessary to do so because of withholding tax issues.

Zeltser was imprisoned in Belarus between March 2008 and June 30, 2009. During this time, defendant Alexander Fishkin, Esq., took over representation of MBOF on Zeltser's behalf.

MBOF learned later, probably sometime in 2009, that the money was held at J.P.

Morgan Chase Bank in accounts under the name of defendant M.E. Seltzer, rather than in the name of S&Z, although it was supposed to be in an attorney escrow account. In a February 12, 2009 corporate resolution, MBOF revoked the appointment of S&Z as its escrow agent. On June 28, 2008, the funds were withdrawn from the M.E. Seltzer accounts and deposited into escrow accounts in the name of defendant Interel Corporation. Out of the $4.3 million, only $10,000 now remains.

MBOF asserts causes of action for common law fraud, conversion, breach of contract, breach of fiduciary duty, unjust enrichment, and permanent injunction against various combinations of the defendants.

The counterclaims, filed by S&Z, "as Trustee for the assets of Kayley Investments, Ltd.," and defendant Joseph Kay, tell a wholly different story.

According to the counterclaims: MBOF was created in 2002 as an offshore alter ego of MBC. MBOF is not an innocent investor in MBC, but rather complicit in the financial scam rigged by MBC and responsible for stealing the money of Kayley, an innocent investor. Among MBOF's creators was Peter Lombardi, who is now serving a 20-year prison sentence for his crimes related to MBC.

The counterclaims concede that MBOF and its current principals have not been prosecuted or charged with any crime. According to the counterclaims, this is because Kayley never filed complaints, apparently succumbing to MBOF's requests not to do so upon assurances that MBOF would help Kayley recover its $15 million investment. Kayley's investment allegedly originated with a person named Arcady Patarkatsishvili ("Badri"), now deceased.

While S&Z is a defendant in this lawsuit, the counterclaim-plaintiff, S&Z "as Trustee for the assets of Kayley Investments, Ltd.," is not. S&Z claims to bring these counterclaims as trustee of the assets of Kayley invested in MBOF. S&Z claims that the funds it holds are held in trust for Kayley, and it took custody of them on instructions of Badri, who owned Kayley before his death on February 12, 2008. Test Trust, according to the counterclaims, is an entity that also participated in frauds against the Zeltser defendants.

The counterclaims seek damages for fraud and conversion, a declaratory judgment declaring that S&Z is sole owner of the assets from Kayley's investment in MBOF, and an injunction enjoining MBOF and related counterclaim-defendants from using the assets at issue.

I dismissed these counterclaims as to MBOF with prejudice in an Order dated November 1, 2010, granting Motion Seq. No. 007. That ruling has now been affirmed by the First Department. *See Mutual Benefits Offshore Fund v. Zeltser*, 2012 N.Y. Slip. Op. 01868 (1st Dept. Mar. 15, 2012). In affirming my order, the First Department held:

> Sternik & Zeltser, sued herein solely in its capacity as plaintiff's former counsel, lacks standing to assert a counterclaim in its separate capacity as a purported trustee or representative of an entity that is not a party to the action. Kay lacks standing to assert a counterclaim because the record does not support his allegation that he has an ownership interest in plaintiff's investment or that he otherwise has a stake in the outcome of the dispute over the funds at issue.

Id. (internal citations omitted).

In another order issued the same day, deciding Motion Seq. No. 005, I granted the

motion for default judgment against five other counterclaim-defendants, as unopposed.[1] These five counterclaim-defendants–Triangle International Management, Ltd. ("Triangle"), Amicorp Curacao B.V. ("Amicorp"), Investarit AG ("Investarit"), Meridian Asset Management Ltd. ("Meridian"), and Mutual Trust SA ("Mutual Trust") (collectively, the "counterclaim-defendants")–had not appeared in this action or opposed the motion.[2]

Motion Seq. No. 011 — Motion to Vacate Default Judgment

The five defaulting counterclaim-defendants now move, under C.P.L.R. § 5015(a)(4) and (a)(1), to vacate the default judgment entered against them. They argue that the counterclaim-plaintiffs did not properly serve them under B.C.L. § 307, that they failed to comply with the Hague Convention with respect to Triangle (a British Virgin Islands corporation), Investarit AG and Mutual Trust SA (Switzerland entities), and Meridian (a Bermuda corporation), and that the Court lacks personal jurisdiction over them under C.P.L.R. §§ 301 and 302. Counterclaim-plaintiffs cross-move for an order under C.P.L.R. § 3211(d), granting leave to take jurisdictional discovery.[3]

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[1] Although the counterclaims identify over a dozen counterclaim-defendants, the motion for default judgment was made as to just MBOF and the five entities now moving to vacate the default judgment.

[2] I note that the form of the default judgment submitted to the court by counterclaim-plaintiffs' counsel is inconsistent with the caption on the counterclaims. The judgment submitted to the Court, which was duly entered, asked for judgment in favor of Joseph Kay and S&Z, whereas the counterclaims identify the counterclaim-plaintiffs as Joseph Kay and S&Z "as Trustee for the assets of Kayley Investments, Ltd."

[3] I accept the reply papers filed by counterclaim-plaintiffs and deny the request to submit a surreply.

In support of the original motion for default judgment, counterclaim-plaintiffs had submitted an Affirmation by Emanuel Zeltser, dated March 21, 2010, attaching as exhibits various affidavits of service attesting that service of the Summons and Counterclaims was made on the Secretary of the State, and that copies of the original Affidavit and the papers were sent to each counterclaim-defendant via Registered Mail, pursuant to B.C.L. § 307. (*See* Efiling Docket Nos. 125, 126-1.) Neither the Zeltser Affirmation nor the attached exhibits specified whether the addresses to which copies were mailed were the registered addresses, business addresses, last known addresses, or any other particular kinds of addresses of the counterclaim-defendants, although the accompanying memorandum of law states that they were mailed to the last known addresses. (Efiling Docket No. 126, at 3.) The receipts for service indicate that the papers were received by four of the addressees; the fifth receipt cannot be deciphered. (Efiling Docket No. 126-1, at 30-44.) The affidavits also attach emails indicating that Amicorp and Meridian were notified of the action by email. (Memo. of Law, Efiling Docket No. 126, at 3; Appx., Efiling Docket No. 126-1, at 21-21.) The above was the only evidence of service offered in support of the motion for default judgment. Counterclaim-defendants concede they were aware of the lawsuit.

In opposition to the instant motion, attached to a new Affirmation by Emanuel Zeltser, dated in 2011, counterclaim-plaintiffs now submit additional affidavits of service, which Zeltser affirms were executed back in 2009. These new affidavits of service are offered in support of the claim that counterclaim-plaintiffs also effected service of the counterclaims in 2009 by personal service on Mutual Trust in the Netherlands, on Meridian in New York, and on Triangle in Florida. I disregard these belatedly-submitted affidavits as

unreliable because they were not offered in support of the original motion for default, and they are of dubious veracity.

Under C.P.L.R. § 5015(a), a court may relieve counterclaim-defendants from the judgment "upon such terms as may be just" upon the grounds of a lack of jurisdiction to render the judgment, under § 5015(a)(4)), or upon a finding of excusable default, under § 5015(a)(1), "if such motion is made within one year" of entry of the judgment or order by the moving party.

I first address counterclaim-defendants' claim that the judgment is void because they were not properly served, and therefore the court lacked jurisdiction to enter that judgment, under C.P.L.R. § 5015(a)(4). "[A] judgment against a defendant is void if the defendant has not been properly served." *Wood v. Wood*, 231 A.D.2d 713, 714 (2d Dept. 1996). No showing of either excusable default or merit is necessary under § 5015(a)(4).

Four of the counterclaim-defendants – Triangle, Investarit, Meridian, and Mutual Trust – claim that service was improper because it was not made in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 (the "Hague Convention"). All five counterclaim-defendants claim that service was improper because it did not comply with B.C.L. § 307.

"If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). Since New York's B.C.L. § 307 requires the transmittal of a copy of process abroad, the Hague Convention applies.

Article 15 of the Hague Convention "requires service of process either by actual delivery or by 'a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory.'" *Sardanis v. Sumitomo Corp.*, 279 A.D.2d 225, 228 (1st Dept. 2001). Article 10(a) of the Hague Convention further provides that, provided the state of destination does not object, it is permissible to "send judicial documents by postal channels, directly to persons abroad." The First Department in *Sardanis* held, however, that this language "pertains to the forwarding of informational material, not the 'service' of documents for jurisdictional purposes." *Sardanis*, 279 A.D.2d at 228-29 (quoting Hague Convention, 20 U.S.T. 361, art. 10, ¶ (a)) (dismissing complaint served upon a defendant Japanese corporation with no business address or designated agent in New York by service on Secretary of State pursuant to B.C.L. § 307, for lack of personal jurisdiction); *see also Cantarelli S.P.A. v. L. Della Cella Co.*, 40 A.D.3d 445, 445 (1st Dept. 2007) (plaintiff's argument based on its independent interpretation of article 10(a) of the Hague Convention was "unavailing," citing *Sardanis*).

The papers submitted in support of the original motion for default judgment did not assert or provide evidence of actual delivery of process. Therefore, compliance with the Hague Convention boils down to whether service of process was adequate under New York State law. The governing statute is B.C.L. § 307.

"Business Corporation Law § 307 establishes a mandatory sequence and progression of service completion options to acquire jurisdiction over a foreign corporation not authorized to do business in New York." *Stewart v. Volkswagen of America, Inc.*, 81 N.Y.2d 203, 207 (1993). "The statute is precise as to the sequence of service and notice actions

necessary to initiate and complete acquisition of jurisdiction." *Id.* at 205.

> Because the appointment of the Secretary of State as agent is a constructive rather than an actual designation, the statute contains procedures calculated to assure that the foreign corporation, in fact, receives a copy of the process .... These are not mere procedural technicalities but measures designed to satisfy due process requirements of actual notice.

Flick v. Stewart-Warner Corp., 76 N.Y.2d 50, 56 (1990). Thus, a litigant attempting to effect service on an unauthorized foreign corporation under § 307 must first "ascertain that there was no post office address specified for [it] to receive process or other registered or office address for [it] on file with the [foreign] equivalent of the Secretary of State before descending to the next level of notification options, i.e., mailing a copy of the process to "the last address [] known to the plaintiff."" *Stewart*, 81 N.Y.2d at 208 (quoting B.C.L. § 307(b)(2)). A litigant attempting to effect service may not simply send process "to the last [known] address" of the foreign corporation "without attempted satisfaction or explanation of the preceding service prescriptions" in B.C.L. § 307(b)(1) and (b)(2). *Id.* at 206.

But this is exactly what counterclaim-plaintiffs claimed, in their original papers seeking default judgment, to have done. They served the Secretary of State and sent copies by Registered Mail directly to each of the counterclaim-defendants at an address overseas, without demonstrating that they had attempted to satisfy the service prescriptions in B.C.L. § 307.

Under First Department law, service on the Secretary of State and mailing documents to each of the counterclaim-defendants at an address overseas is inadequate to satisfy B.C.L. § 307, and therefore does not satisfy Article 15 of the Hague Convention.

Counterclaim-plaintiffs maintain that the First Department overruled *Sardanis sub*

silencio in *Gouiran Family Trust v. Gouiran*, 40 A.D.3d 400 (1st Dept. 2007). This argument is unpersuasive for a few reasons. First, the grounds for the *Gouiran* court's decision are unclear. Although the *Gouiran* court noted there had been "no showing by defendants that French law does not permit service by mail under the Hague Convention," it seems to have reached its decision on other grounds. It also did not indicate that it intended to overrule *Sardanis* (which, in contrast, *had* clearly indicated its intent to overrule a previous First Department case). Finally, the *Gouiran* case involved extraordinary facts, not present here. *See Gouiran*, 40 A.D.3d at 401 (affirming trial court decision vacating default confessions of judgment fraudulently filed on behalf of defendant, who had engaged in "blatant, decades-long flouting of court orders, [fled] from justice, and [perverted] the legal system").

I decline to speculate whether the First Department in the future may overrule *Sardanis*. Courts in New York County continue to be bound by its holding that service of process by postal channels directly to persons abroad is not permitted by the Hague Convention. Applying *Sardanis*'s construction of Article 10(a) of the Hague Convention, and based on the affidavits of service submitted in support of counterclaim-plaintiffs' initial motion for default judgment, I am required to conclude that counterclaim-plaintiffs did not properly serve the five counterclaim-defendants. Therefore, the default judgments entered against them must be vacated under C.P.L.R. § 5015(a)(4).[4]

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[4] The alleged service by mail on Investarit and Mutual Trust, Swiss entities, was additionally defective because the undisputed record on this motion indicates that Switzerland has objected to service of judicial documents to persons overseas directly by postal channels, according to the method described in Article 10 of the Hague Convention.

Alternatively, counterclaim-defendants move to vacate the default judgment based on excusable default under C.P.L.R. § 5015(a)(1). This motion is timely; it was made within a year of the entry of the November 1, 2010 order. "A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action." *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 141 (1986).

As an excuse for their delay in appearing, counterclaim-defendants argue that they were not properly served and reasonably believed that the Court lacked jurisdiction over them. In fact, under the controlling law, as discussed above, service was defective. Therefore, their belief that the Court lacked jurisdiction over them was reasonable. They had a reasonable excuse for their failure to appear.

Counterclaim-defendants assert as a meritorious defense the argument made by MBOF in its motion to dismiss the counterclaims (Motion Seq. No. 007), that the counterclaim-plaintiffs are improper parties. As discussed earlier in this decision, the First Department affirmed my ruling that the counterclaim-plaintiffs were improper parties, in its March 15, 2012 decision, affirming my dismissal of the counterclaims against MBOF. Accordingly, this argument appears to be a meritorious defense.

Therefore, the default judgment must be vacated pursuant to C.P.L.R. § 5015(a)(1).

Moreover, in addition to my statutory power to vacate default judgments under C.P.L.R. § 5015, I have "inherent power" to vacate judgments and orders "on appropriate grounds." *McMahon v. City of New York*, 105 A.D.2d 101, 104 (1st Dept. 1984). A court

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(Gilmore Aff. Exs. G, H; Memo. in Opp'n, at 10-11.)

has this inherent power, even where the default was deliberate. *See Hensey Properties, Inc. v. Lamagna*, 23 A.D.2d 742, 743 (1st Dept. 1965) (as a condition of relieving defendant from its "deliberate" default, it was "required to pay substantial costs and disbursements"). As an alternative ground for my decision, I would exercise this inherent power to vacate the previous order and judgment of default against counterclaim-defendants.

Finally, the cross-motion by counterclaim-plaintiffs for jurisdictional discovery is denied. Because my decision rests on other grounds, I do not need to reach the questions of whether there is personal jurisdiction over the counterclaim-defendants, or whether the running of the statute of limitations is a meritorious defense.

Motion Seq. No. 012 — Motion for Leave to Intervene

In this motion, proposed intervenors Kayley Investments, Ltd. ("Kayley") and Imedinvest Trust, represented by Abramson Law Group ("ALG"), seek leave to intervene in this litigation under C.P.L.R. §§ 1012 and 1013, in order to assert a declaratory judgment claim to ownership of MBOF and any MBOF assets held by the MBC receiver, including the funds at issue in this litigation, among other claims. They name 16 defendants in their proposed complaint, including the firm of Gusrae Kaplan Nusbaum PLLC, three of its attorneys, and six other new individual defendants.[5] Insofar as the proposed intervenors' complaint does not separately enumerate or label any causes of action, there appears to be only one proposed cause of action, seeking a declaratory judgment.

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The proposed complaint alleges that Gusrae Kaplan and its attorneys improperly filed U.C.C. liens against MBOF and "may potentially claim an interest in the assets of MBOF or Kayley." (Intervenors' Prop'd Compl. ¶¶ 31-32.)

Appended to the proposed intervenors' papers is a Declaration signed by a Gennady Sinski, a new character in this saga. Sinski claims to be a director of MBOF and a trustee of Imedinvest Trust. Sinski asserts that Imedinvest Trust owns both Kayley and MBOF, and that Kayley is the holding company of MBOF. Among other things, Sinski's Declaration substantiates the proposed intervenors' claim that the current officers of MBOF, W. Shaun Davis and Christopher Samuelson, had no authority to bring this lawsuit on behalf of MBOF and have engaged in fraud to embezzle Imedinvest's and Kayley's investment in MBOF by falsely depicting MBOF as owned by Triangle, Davis's company. Sinski claims that MBOF "equitably belongs to Kayley and Imedinvest, and by extension, equitably belongs to the Investors." (Sinski Decl. ¶ 17.)

In an Affirmation by David S. Abramson, Esq., a member of ALG, the proposed intervenors assert that, if they were permitted to intervene and proved their claim to be the true owners of MBOF, MBOF's claims against defendants would have to be dismissed. (Abramson Affirm. ¶ 14.) Abramson further affirms that the proposed intervenors' interests in this lawsuit are not adequately represented by MBOF, because MBOF, through its lawyers, is acting in furtherance of "the pretenders hiding behind the ostensible Plaintiff." (Abramson Affirm. ¶ 26.)

Kayley claims that its co-principals included Joseph Kay and the late Badri–whom defendant Emanuel Zeltser has claimed, elsewhere in this litigation, to be his long-time clients.

MBOF, in opposition, maintains that ALG does not represent Kayley, and Imedinvest Trust and Sinski are fictional characters. MBOF further contends that the proposed

complaint duplicates claims in an ongoing proceeding in the U.S. Bankruptcy Court for the Southern District of Florida (the "Florida action"), in which a court-appointed examiner has produced a report exceeding 90 pages addressing the ownership of MBOF and who its actual and duly authorized representatives and attorneys are.

I will first address the argument for mandatory intervention under C.P.L.R. § 1012. "[A]ny person shall be permitted to intervene" as of right "[w]hen the representation of the person's interest by the parties is or may be inadequate ***and*** the person is or may be bound by the judgment." C.P.L.R. § 1012(a)(2) (emphasis added). "[A]ny person shall be permitted to intervene" as of right "[w]hen the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." C.P.L.R. § 1012(a)(3).

The proposed intervenors assert that they are inadequately represented in this action, because "those purporting to act on behalf of MBOF . . . have no interest in advocating on behalf of the Proposed Intervenors." (Reply Br. at 8.) It is evident from a review of their proposed complaint and moving papers that the proposed intervenors and defendants share an identity of interests. The proposed intervenors' interests appear to be adequately represented in this action by defendants Emanuel Zeltser and Kay.

Furthermore, this motion was filed on November 7, 2011–more than two years after this action began, one year after the counterclaims as against MBOF were dismissed, near the end date for completion of discovery, and ten days before the Note of Issue was filed–without an adequate explanation for the delay. The proposed complaint seeks to add ten new parties. The proposed new claims, as well as the existence of Imedinvest Trust and

its principal, Gennady Sinski, are vigorously disputed by plaintiff. I conclude that to permit this intervention would invite further discovery and motion practice, prolonging this litigation by months, if not years. I deem this motion not to have been filed in a timely manner.

Consequently, because their interests are adequately represented in this action and their motion is untimely, the proposed intervenors are not entitled to intervene under C.P.L.R. § 1012.

On similar grounds, I deny the request for permission to intervene under C.P.L.R. § 1013. C.P.L.R. § 1013 provides that, "[u]pon timely motion, "any person may be permitted to intervene in any action . . . when the person's claim or defense and the main action have a common question of law or fact," based on the court's considerations of "whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." For the reasons stated above, I find that the proposed intervention is untimely and would unduly delay the determination of this action.

Consequently, the motion to intervene is denied.

Motion Seq. No. 013 — Motion to Strike Note of Issue

In this motion, defendants Emanuel Zeltser, S&Z, Kay, Mark Zeltser, Interel, and M.E. Seltser ("defendants") move under 22 N.Y.C.R.R. § 202.21(e) to strike plaintiff's Note of Issue and Certificate of Readiness on the grounds that discovery is incomplete and the Certificate of Readiness incorrectly represented that discovery has been completed.

In light of my ruling granting the motion to vacate the default judgment as to the counterclaim-defendants, the request to vacate the Note of Issue must be granted. In light

of the First Department's March 15, 2012 decision, however, further discovery is stayed, pending a status conference on May 3, 2012 at 11:00 a.m. to devise a scheduling order and to discuss the impact, if any, of the First Department's March 15, 2012 decision on the remainder of this action.

Dated: 3/30/2012

ENTER:

HON. BERNARD J. FRIED
J.S.C.