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SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL  
Justice Supreme Court

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JMF CONSULTING GROUP II, INC. (formerly  
known as JMF CONSULTING GROUP, INC.)

Plaintiff,

-against-

BEVERAGE MARKETING USA, INC.,

Defendant.

-----X  
BEVERAGE MARKETING USA, INC.,

Counterclaim Plaintiff,

-against-

JMF CONSULTING GROUP II, INC. (formerly  
known as JMF CONSULTING GROUP, INC.),

Counterclaim Defendant.

-----X  
BEVERAGE MARKETING USA, INC.,

Third Party Plaintiff,

-against-

JOHN M. FEROLITO,

Third Party Defendant.  
-----X

: TRIAL/IAS PART: 25  
: NASSAU COUNTY  
:  
: Index No: 011005/08  
:  
: Motion Seq. Nos: 4, 5 & 6  
: Submission Date: 8/3/09

**Papers Read on these Motions:**

**Notice of Motion, Affidavit in Support (Hepworth) and Exhibit .....X**  
**Exhibits 14-25 of Hepworth Affidavit (filed under seal).....X**  
**Memorandum of Law in Support.....X**  
**Notice of Motion, Affidavit in Support (Fink) and Exhibits.....X**  
**Memorandum of Law in Support.....X**  
**Notice of Cross Motion, Affirmation in Support/Opposition and Exhibits...X**  
**Memorandum of Law in Support/Opposition.....X**  
**Memorandum of Law in Opposition/Support.....X**  
**Reply Affidavit and Exhibit.....X**  
**Exhibit 2 of Hepworth Reply Affidavit (filed under seal).....X**  
**Reply Memorandum of Law in Support.....X**  
**Reply Memorandum of Law in Support.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff JMF Consulting Group, II, Inc. (“JMF”) and Third-Party Defendant John M. Ferolito (“Ferolito”) on April 23, 2009, 2) the motion filed by JMF, Ferolito and non-parties Richard Adonailo (“Adonailo”) and David Buss (“Buss”) (“Non-Party Witnesses”) on April 27, 2009, and 3) the cross motion filed by Defendant/Counterclaim Plaintiff/Third Party Plaintiff Beverage Marketing USA, Inc. (“BMU”) on June 2, 2009, all of which were submitted on August 3, 2009. For the reasons set forth below, the Court 1) grants Motion Sequence # 4 in part and denies it in part; 2) grants Motion Sequence # 5 in part and denies it in part; and 5) grants the cross motion (Motion Sequence # 6) in part and denies it in part. Specifically, the Court: 1) grants Plaintiff’s motion to discontinue the main action, concerning demand for repayment of a promissory note, with prejudice, and declines to award defendant attorney’s fees or impose any other conditions on the discontinuance; 2) denies both JMF’s motion to transfer BMU’s counterclaims, and Ferolito’s motion to transfer the third-party claims, to New York County; 3) in light of its denial of the motion to transfer the counterclaims and third-party claims to New York County, denies as moot JMF’s request that discovery issues with regard to those claims be decided by Justice Shulman of New York County; 4) grants the motion by JMF and Ferolito for a protective order with respect to depositions to the extent that the Court directs that a) Ferolito’s deposition is stayed until the deposition of Domenick Vultaggio has been completed; and b) the depositions of Adonailo and Buss are stayed until the deposition of Ferolito has been completed; 5) grants Plaintiff’s motion for a protective order regarding the production of documents to the extent that

the Court denies discovery of documents that BMU requested in requests numbers 4-6 and otherwise denies Plaintiff's motion for a protective order; and 6) grants Defendant's motion to compel discovery with respect to all items except those regarding which the Court herein denies discovery.

A. Relief Sought

In their Motion (Motion Sequence # 4), JMF and Ferolito move for an Order:

1) approving JMF's voluntary discontinuance with prejudice of its claim on a demand promissory note, based on the payment by BMU of a portion and setoff of the remainder of the debt; 2) transferring BMU's counterclaims and third-party claims for joint trial and pretrial proceedings in the related, pending New York County action of *Ferolito et al. v. Vultaggio et al.*, Index No. 600396/08 ("New York County Action"); and/or 3) dismissing all of BMU's counterclaims against JMF and all of BMU's third-party claims against Ferolito.

In their Motion (Motion Sequence # 5), JMF, Ferolito and non-parties Adonailo and Buss move for an Order: 1) issuing a protective order, pursuant to CPLR § 3103(a), staying all discovery in this action pending determination of the motion to dismiss or transfer; 2) vacating the Preliminary Conference Order and discovery schedule that this Court set, so that discovery can be coordinated with and set by the Court in the New York County Action; 3) striking the deposition notice served on Ferolito; 4) striking the deposition notice and subpoena served on Adonailo; 5) striking the deposition notice and subpoena served on Buss; 6) striking the document requests that BMU served; 7) striking the discovery requests that BMU served, based on alleged conflicts of interest and lack of authority of BMU's counsel; and 8) to the extent that the Court does not vacate the Preliminary Conference Order, preserving JMF's and Ferolito's discovery priority as the effective defendants on any remaining counterclaims and third-party claims, by directing that a) JMF and Ferolito will not be served with any discovery prior to the expiration of the time for them to answer the counterclaims and third-party complaint; and b) JMF and Ferolito will not be required to respond to any of BMU's discovery requests prior to the time by which BMU must respond to any discovery requests that JMF and/or BMU serve concurrently with their Answer.

In its Cross Motion, Defendant/Counterclaim Plaintiff/Third Party Plaintiff BMU moves for an Order, pursuant to CPLR § 3124, requiring JMF, Ferolito and the Non-Party Witnesses to comply immediately with BMU's outstanding discovery demands.

B. The Parties' History

This action is part of a power struggle between the two major shareholders in a group of closely held corporations. Defendant BMU is one of the "Arizona Entities" that produce Arizona Iced Tea. Ferolito and Domenick Vultaggio ("Vultaggio") started the business in 1992, but Vultaggio has allegedly played a more active role in the business in recent years. At present, the Ferolito Group has a 48% stake in the Arizona companies, and the Vultaggio Group has a 50% interest.<sup>1</sup>

In 1998, parties described in the agreement as the "Ferolito Owner Group," "Vultaggio Owner Group," (which included Ferolito and Vultaggio and were collectively described in the agreement as the "Owners") and "Arizona Entities," entered into an Owners' Agreement ("Agreement"), covering all of the Arizona companies. Notably, the Agreement contains a provision prohibiting a transfer of stock to anyone other than an owner or their immediate families (or personal representative, executor or trust for the benefit of the Owner). The transfer restriction provision does not include a method for valuing an interest in the company, in the event that it is purchased by another shareholder.

In Article 2, titled "Compensation and Distributions," the Agreement provides that the Ferolito Group and the Vultaggio Group are each to receive "50% of all Arizona Payments." Article 2.1 (a) of the Agreement provides that "the term 'Arizona Payments' shall be applied as liberally and as broadly as possible..." and includes "any and all amounts paid, payable, or credited to,...the Executives or the Owners howsoever characterized..." Additionally, the owners are to be "responsible, as among themselves, to determine how to characterize any such Arizona Payments."

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<sup>1</sup> The First Amended Complaint in the New York County Action states that the "Ferolito Group" consists of Ferolito, individually and as co-trustee for the John Ferolito, Jr. Grantor Trust; John Ferolito, Jr.; Richard N. Adonailo, as Co-Trustee for the Ferolito Family 1996 Special Family Trust and the John Ferolito, Jr. Grantor Trust; J.F. Capital L.P.; JMF Investment Holdings, Inc.; and Elizabeth Ann Barulic. That Complaint states, further, that the "Vultaggio Group" consists of Domenick J. Vultaggio; Spencer Vultaggio; Wesley Vultaggio; DV Capital, L.P.; the Vultaggio Family 1996 Special Trust; and RoseAnn M. Rochford.

Vultaggio asserts that he and Ferolito had agreed that they would contribute to each company's working capital in equal amounts and would repay loans from shareholders on an equal basis. The Court notes that, while Article 2 of the Agreement does not address the basis upon which loans or capital contributions would be made, it appears consistent with such an agreement as to repayment.

During 2005 and 2006, Ferolito and Vultaggio made over \$100 million in loans to the Arizona companies, purportedly to meet the working capital needs of the corporations. Among these advances was a \$20 million loan that Ferolito, through JMF, one of his corporations, made to BMU. The loan was evidenced by a non-negotiable promissory note ("Note") dated January 1, 2006 which provided for interest at the rate of 6%. Vultaggio made a similar loan in an equal amount on the same date.

In 2007, a large international conglomerate, the Tata Group, expressed interest in purchasing the Arizona companies. The Vultaggios apparently opposed the purchase because Tata wanted to acquire the Arizona companies on a "debt-free basis," and the Vultaggios were unwilling to repay all shareholder loans. Nevertheless, on August 8, 2008, the Ferolitos entered into an agreement to sell a 2% interest in the Arizona companies to Arizona Beverage Acquisition, LLC. In the agreement, the Ferolitos granted Arizona Beverage an option to purchase an additional 23% interest for a total price of \$4.32 billion.<sup>2</sup> The Vultaggios objected to the transaction, claiming that it violated the stock transfer restriction in the shareholder agreement.

On February 8, 2008, the Ferolitos commenced the New York County Action against the Vultaggios, seeking a declaration that the stock transfer restriction provision was unenforceable. Adonailo, a co-trustee of the Ferolito Family Trust, was named as one of the plaintiffs in that action. In the complaint in the New York County Action, plaintiffs alleged that the stock transfer restriction was unreasonable, and that Ferolito signed the Agreement without being aware of the stock transfer restriction. On October 17, 2008, a first amended complaint was served in the New York County Action, adding Arizona Beverage Acquisition as a plaintiff.

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<sup>2</sup> The stock was to be acquired by Patriarch Partners, LLC, Arizona Beverage Acquisition's nominee. It is unclear whether Arizona Beverage Acquisition is affiliated with Tata.

In their answer to the first amended complaint in the New York County Action, the Vultaggios asserted numerous counterclaims. In the first counterclaim, they assert breach of contract against the Ferolitos, based on the Ferolitos' alleged breach of the stock transfer restriction in the Agreement. The Vultaggios also asserted a second counterclaim against Arizona Beverage Acquisition for tortious interference with the Agreement. A third counterclaim sought rescission of the Ferolitos' agreement with Arizona Beverage Acquisition on the ground that it violates the Agreement. The fourth counterclaim sought a declaratory judgment that, pursuant to the Agreement, an "employment separation event" had occurred with respect to Ferolito, entitling the Vultaggio group to control the management of the companies. The fifth counterclaim sought a permanent injunction, prohibiting Ferolito from participating in the management of the companies. The sixth counterclaim sought damages for breach of contract based upon Ferolito's attempt to participate in the management of the company, particularly with respect to sales in the Latin American market. The seventh counterclaim sought a declaratory judgment that the stock transfer restriction was valid and enforceable. The eighth counterclaim sought a permanent injunction, enjoining the Ferolitos from transferring their interests to anyone other than a transferee permitted by the Agreement.<sup>3</sup>

On June 13, 2008, JMF commenced the present action, in this court, on the \$20 million Note.<sup>4</sup> By notices of motion dated August 18, 2008, JMF moved for summary judgment on the Note and for a protective order. BMU opposed the summary judgment motion on various grounds, including the existence of an alleged agreement that shareholder loans would be repaid only upon the consent of both groups of shareholders.

By Order dated February 4, 2009 ("Prior Decision"), Hon. Leonard Austin denied Plaintiff's motion for summary judgment on the ground that there was a triable issue of fact as to whether the shareholder agreement regarding the calling of loans barred enforcement of the Note without the joint approval of the two groups of shareholders. Justice Austin noted that advances to the capital stock of a corporation may be disguised as shareholder loans to claim an interest

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<sup>3</sup> Defendants also asserted several other counterclaims and third-party claims in the New York County Action which are not relevant for the purposes of the present motions.

<sup>4</sup> JMF Consulting Group II is the successor to JMF Consulting Group, the original payee on the note that BMU issued.

deduction or for other tax considerations, citing *Tyler v Tomlinson*, 414 F.2d 844 (5<sup>th</sup> Cir. 1969). Nevertheless, for the purpose of the summary judgment motion, the Court assumed that the loans were valid and that any agreement with respect to repayment was lawful. However, Justice Austin also held that BMU could offset the balance of a loan to Ferolito from Hornell Brewing Co., a wholly-owned subsidiary of Beverage Marketing, provided that Hornell assigned the loan to its parent corporation.

With respect to Plaintiff's motion for a protective order, the Court ruled in the Prior Decision that because "an improper tax motive" may affect the enforceability of the Note, Defendant was entitled to discovery concerning the "shareholder loan program." However, the Court ruled that, because JMF had standing to sue upon the Note, there was no need for discovery as to the reorganization of JMF or the relationship between Ferolito and his corporation. The Prior Decision makes no reference to the pendency of the New York County Action.

On March 6, 2009, BMU amended its answer in the present action to assert counterclaims against JMF and a third-party claim against Ferolito. The counterclaims were amended on March 24, 2009 and the third-party claim was amended on March 30, 2009. In the first counterclaim, BMU claims that Ferolito breached a shareholder agreement to contribute equally to BMU's capital needs by demanding payment on the Note which was the subject of the main action. In the second counterclaim, BMU claims that JMF was unjustly enriched by receiving payments on that demand note, as well as a \$10 million demand note which had been issued to JMF on December 28, 2005.

With respect to the third counterclaim, BMU alleges that at the end of 2007, Vultaggio loaned \$24 million to BMU through his company, DV Capital, and Ferolito loaned an equal amount through JMF at an interest rate of 10%. BMU alleges that, although prior notes had been payable on demand, the notes reflecting these loans were issued for a five year term. BMU further alleges that in January 2009, Ferolito purported to issue a \$24 million demand note in replacement of the term note without obtaining BMU's authorization. BMU seeks a declaratory judgment that the 2007 notes were properly issued for a term of five years, rather than on demand.

In the third-party claim, BMU alleges that Ferolito breached a contract to contribute equally to BMU's capital needs. BMU further alleges that Ferolito breached a fiduciary duty owed to BMU and the Vultaggio shareholders by refusing to provide capital to the company.

By Order in the New York County Action dated May 21, 2009, Hon. Martin Shulman denied plaintiff's motion for partial summary judgment and granted defendant's cross-motion for summary judgment with respect to their seventh counterclaim. Justice Shulman held that, given the founding shareholders' goal of providing for their families, the transfer restriction was valid and enforceable. The Court in the New York County Action stated that Ferolito's "strained arguments," an apparent reference to his claim of being unaware of the shareholder restriction, had no "valid basis." The Court further stated that Ferolito's "flirtation" with Arizona Beverage "borders on unconscionable."

### C. The Parties' Positions

Plaintiff JMF now moves to discontinue its claim on the Note with prejudice pursuant to CPLR § 3217(b). Plaintiff asserts that, after deducting \$7,250,000 in principal payments on the Note, and offsetting the \$12,750,000 outstanding on the Hornell loan, the Note has been paid. Additionally, JMF and Ferolito move, pursuant to CPLR § 602, to transfer BMU's counterclaims and third-party claims to New York County so that those claims may be joined with the New York County Action.

By separate notice of motion, BMU, Ferolito and non-parties Adonailo and Buss move, pursuant to CPLR § 3103(a), for a protective order and to strike BMU's demands for discovery. BMU served notices of deposition dated March 25, 2009 on Ferolito, Adonailo, and Buss. BMU also served requests for production of documents on JMF dated March 25, 2009. Adonailo, who is a co-trustee of a Ferolito family trust and a plaintiff in the New York County Action, also exercises Ferolito's power of attorney. Buss is the attorney who represented the Ferolitos in connection with the agreement to sell a part of their interest to Arizona Beverage Acquisition. JMF argues that discovery concerning the shareholder loan program is unnecessary because, after deducting the balance of the Hornell loan, the note that JMF held has been paid. JMF further argues that, if the counterclaims and third-party claims are transferred, any issues with regard to discovery should be resolved by Justice Shulman.



While BMU does not object to the discontinuance of JMF's claim on the note, BMU requests attorney's fees it incurred in opposing JMF's summary judgment motion. BMU opposes transfer of its counterclaims and third-party claims to New York County, on the ground that its claims for breach of the agreement to contribute equally to the capital of BMU are separate from its claims for breach of the stock transfer restriction provision in the Agreement. BMU cross-moves, pursuant to CPLR § 3124, to compel discovery concerning the shareholder loans and the other matters as to which it has requested discovery.

#### RULING OF THE COURT

##### A. Discontinuance of the Main Action is Appropriate

With certain exceptions not relevant to the present case, CPLR § 3217(b) provides that an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts, the court may not order an action discontinued except upon the stipulation of all parties appearing in the action. It is within the sound discretion of the court whether to grant plaintiff permission to discontinue the action. *White v. Erie*, 309 A.D.2d 1299 (4<sup>th</sup> Dept. 2003). Because a party cannot be compelled to litigate, absent special circumstances, the court should grant discontinuance. *Id.* The court may deny the motion upon a showing of particular prejudice to defendant or other improper consequences flowing from discontinuance. *Id.* The court must also consider the stage that litigation has reached; the later the stage, the greater the scrutiny of the plaintiff's motives. *Kane v. Kane*, 163 A.D.2d 568 (2d Dept. 1990).

Although the case before the Court has proceeded past the summary judgment stage, it has not been submitted to the fact finder. While JMF's initial claim was based upon one individual loan, BMU's counterclaims concern a broader agreement as to the method of corporate finance. As discontinuance of the main claim will have no bearing on BMU's counterclaims, BMU has not demonstrated that it will be prejudiced by discontinuance of the main claims. Accordingly, the Court grants Plaintiff's motion to discontinue the main action with prejudice. Plaintiff's motion to discontinue was based, not upon a concession that the underlying obligation was invalid, but on Plaintiff's contention that it has been paid. Under the circumstances, the Court declines to award defendant attorney's fees or impose any other conditions on the discontinuance.

B. The Two Actions Do Not Overlap to an Extent Warranting Consolidation

CPLR § 602 provides, “When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay.” A motion for consolidation or joint trial is addressed to the sound discretion of the court. *RCN Construction Corp. v. Fleet Bank*, 34 A.D.3d 776 (2d Dept 2006). Where there are common questions of law or fact, absent a showing of substantial prejudice, consolidation is proper. *Id.* Where, however, lawsuits arise out of the same transactions, but the proof with respect to each lawsuit does not overlap, the identity of facts is not sufficient to merit consolidation or a joint trial of the lawsuits. *Aluminum Mills Supply Corp. v. Skyview Metals, Inc.*, 117 A.D.2d 765, 767 (2d Dept. 1986).

JMF argues that the New York County Action and the present action share common questions because they involve the same parties, the same shareholder agreement, and the same loans to the same corporation. BMU’s counterclaims and third-party claims in the New York County Action, however, involve Ferolito’s breach of the stock transfer restriction and his right to participate in the management of the companies. By contrast, BMU’s counterclaim and third-party claims in the present case involve Ferolito’s breach of an alleged agreement to contribute equally to the capital of the corporation. The 2007 promissory notes, which comprise a significant part of the proof of these claims, are not mentioned in the New York County pleadings. The court concludes that the proof in the present case will not significantly overlap with that in New York County. Accordingly, the Court denies both JMF’s motion to transfer BMU’s counterclaims, and Ferolito’s motion to transfer the third-party claims, to New York County.

C. Protective Orders Are Appropriate Regarding Deposition Priority and Document Production

CPLR § 3103(a) provides that “The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device.” The Court’s denial of the motion to transfer the counterclaims and third-party claims renders inapplicable

JMF's argument that discovery issues with regard to those claims should be decided by Justice Shulman.

CPLR § 3106 provides that leave of court is required if a notice of the taking of the deposition of a party is served by the plaintiff before that party's time for serving a responsive pleading has expired. This provision ordinarily accords priority as to taking depositions to defendant, but the priority is reversed as to counterclaims. *Sun Plaza Enterprises v. Crown Theatres*, 307 A.D.2d 352 (2d Dept. 2003). JMF and Ferolito object to the notice of deposition served on Ferolito on the ground that Ferolito is a party and that plaintiff has priority with respect to depositions as to defendant's counterclaim. The Court agrees and, accordingly, grants the motion by JMF and Ferolito for a protective order to the extent that the Court directs that Ferolito's deposition is stayed until the deposition of Vultaggio has been completed.

JMF also objects to the notices of deposition served on Adonailo and Buss on the ground that they are non-party witnesses and the depositions of such persons are ordinarily not taken until after the depositions of the parties. The Court notes that, while these witnesses are not parties, they are clearly aligned with the Plaintiff. Accordingly, the Court grants Plaintiff's motion for a protective order to the extent that the Court directs that the depositions of Adonailo and Buss are stayed until the deposition of Ferolito has been completed.

JMF also objects to BMU's request for production of documents on the ground that plaintiff also has priority as to document production. This is incorrect; there is no priority as between plaintiff and defendant as to discovery and inspection of documents and things. *See McKinney's Practice Commentaries to CPLR § 3120 at 222*. Thus, the Court will proceed to the propriety of Defendant's specific document requests.

BMU seeks documents and communications concerning loans between JMF and BMU, between Ferolito and BMU, the Hornell loan, and the 2007 notes. Documents relating to specific loans may be relevant to a shareholder agreement to contribute equally to the capital needs of the corporation, even if the loans have been paid.

The Court concludes that Defendant's requests numbers 4-6 seek documents that are covered by Justice Austin's protective order.<sup>5</sup> JMF's standing to sue upon the Note is no longer an issue. However, the formation of the lending corporation, and the liquidation of its predecessor, may be relevant to an agreement as to repaying the loans or funding the capital needs of the Arizona corporations. Ferolito's authority to act for the lending or borrowing corporations may also be relevant to these matters. Accordingly, applying Judge Austin's Prior Decision regarding the protective order to the facts before the Court, the Court denies discovery of documents requested in requests numbers 4-6 and otherwise denies Plaintiff's motion for a protective order. The Court grants Defendant's motion to compel discovery with respect to all items except those regarding which the Court herein denies discovery.

This shall constitute the decision and order of the Court.

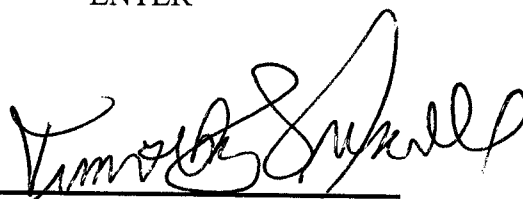
All matters not decided herein are hereby denied.

Counsel are reminded of their required appearance before the Court for a conference on October 16, 2009.

ENTER

DATED: Mineola, NY

September 30, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
OCT 05 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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<sup>5</sup> Request # 4 seeks documents concerning the formation of JMF. Request # 5 seeks documents concerning the liquidation of JMF. Request # 6 requests documents concerning the scope of Ferolito's authority to act for JMF or for BMU. To the extent that request # 6 seeks documents concerning Ferolito's authority to act for JMF, it seeks documents covered by Justice Austin's protective order.