SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

THOMAS HENNESSY, BETTY HENNESSY, JOHN HASLBAUER, BARBARA HASLBAUER, NICHOLAS GAROFALO, ROSEMARY GAROFALO, DWAYNE WOOD, MARIE MAGNUS, DONNA FISCHER, LEE FISCHER, SUMMER FISCHER, TIMOTHY FISCHER, LOUIS PREVET, MARION PREVET, DANIEL AGOSTINELLI, HARRIET AGOSTINELLI, RICHARD CALDERALE, LINDA CALDERALE, RICHARD CALDERALE, CHRISTINE CALDERALE, JASON BUSKE, LAURIN BUSKE, JIM CARNEY, REGINA CARNEY, JUDITH LEONARD, MARK AROCHO, MICHELLE AROCHO, DON MOY, LILLIAN MOY, THOMAS GEIST, JOY GEIST, PASQUALE AIELLO, MARY AIELLO, JAMES VALLAR, JENNIE VALLAR, MICHAEL PECK, SALVATORE MESSANA, CONCETTA MESSANA MICHAEL SMAR, PATRICIA SMAR and JOHN AND JANE DOES "1-100",

Plaintiffs,

-against-

PETER J. DAWSON, BMG ADVISORY SERVICES, LTD., BRASH MANAGEMENT GROUP, LTD., ETHAN THOMAS CO., INC., TAXX PLUS SERVICES, LTD., LISA DAWSON, BRUCE BAKER, GRAY WINSLOW, 21ST CENTURY FINANCIAL SERVICES, INC., FFP SECURITIES, INC., INVEST FINANCIAL CORPORATION, CHARLES MAZZIOTI, GRANITE SECURITIES, LLC, PHH MORTGAGE CORPORATION, FIRST NATIONAL BANK OF LONG ISLAND, COUNTRYWIDE HOME LOANS, INC., HOMECOMINGS FINANCIAL, LLC, WASHINGTON MUTUAL, INC., INDYMAC BANK, CUSTOM CAPITAL CORPORATION, OASIS MORTGAGE, INC., NATIONWIDE LIFE INSURANCE COMPANY, AMERICAN SKANDIA LIFE ASSURANCE COMPANY, FIRST ALLMERICA FINANCIAL LIFE INSURANCE COMPANY, AXA EQUITABLE LIFE INSURANCE COMPANY, and XYZ CORP. "1-10",

Defendants.

MOTION SEQ. NO.: 006, 011, 012, 013, 014, 023

MOTION DATE: 10/2/10

INDEX NO.: 19368/06

6697/07

13770/07

The following papers having been read on the motion numbered (1-20):

Motion Seq. No. 006
- **Notice of Cross Motion....1**
- **Memorandum of Law....2**
- **Affirmation in Opposition....3**
- **Reply Affirmation....4**

Motion Seq. No. 011
- **Notice of Motion....5**
- **Memorandum of Law....6**
- **Attorney's Statement in Support....7**
- **Amended Summons....8**

Motion Seq. No. 012
- **Notice of Motion....9**
- **Memorandum of Law....10**
- **Supplemental Affirmation....11**
- **Affirmation in Opposition....12**

Motion Seq. No. 013
- **Notice of Motion to Dismiss....13**
- **Affirmation in Support....14**

Motion Seq. No. 014
- **Notice of Motion to Dismiss....15**
- **Memorandum of Law....16**
- **Affirmation in Opposition....17**
- **Reply Affirmation....18**

Motion Seq. No. 023
- **Notice of Motion....19**
- **Affirmation in Opposition....20**

Motion by the defendant PHH Mortgage Corporation pursuant to: (1) CPLR 3212, initially pursuant to CPLR 3211[a][7], for an order dismissing the complaint insofar as interposed against it; (2) CPLR 3024[b] striking unnecessary and scandalous material; and (3) 22 NYCRR § 130.1-1 for the imposition of sanctions.

Motion pursuant to CPLR 3211 and 3212 by the defendant Invest Financial Corporation for an order dismissing the complaint insofar as asserted against it.

Joint Motion pursuant to CPLR 3211[a][1], [7] by the defendants Country Wide Home Loans, Inc. and Homecomings Financial Network, Inc., for an order dismissing the

complaint insofar as interposed against them.

Motion pursuant to CPLR 3211[a][1], [7] by the defendants First National Bank of Long Island for an order dismissing the complaint insofar as interposed against it.

Motion pursuant to CPLR 3211[a][1], [7] by the defendant Oasis Mortgage, Inc., for an order dismissing the complaint insofar as interposed against it.

All of the foregoing 3211 motions for summary judgment were converted by this Court pursuant to rule 3211(c) and by United States District Court Judge Joanna Seybert, pursuant to Rule 56 of the FRCP, the federal equivalent of CPLR 3212.

Motion by the plaintiffs pursuant to CPLR 3025[b], 1003, for leave to amend the third amended complaint by: (1) substituting, *nunc pro tunc*, non-parties Indymac Federal Bank, F.S.B. and JPMorgan Chase Bank, N.A. for, respectively, the currently named defendant, Indymac Bank and Washington Mutual, Inc; and (2) adding as new party defendants, American Mortgage Network, Wachovia Bank, N.A., and Citibank, N.A.

The motions presently before the Court arise out of thefts committed by codefendant Peter J. Dawson, a former investment advisor and/or financial planner who was arrested in December of 2006 and later pleaded guilty to stealing over $7.7 million which his clients had entrusted to him (3rd A Cmplt., ¶¶ 47-50).

In sum, beginning in the 1990's, Dawson allegedly informed his clients – many of whom were friends and family members – that he was an investment planner and that he would safely invest their assets so as to obtain an attractive rate of return (3rd A. Cmplt., ¶¶ 47; 53-54, 60). The plaintiffs contend that Dawson's clientele was comprised of relatively unsophisticated investors possessing comparatively limited financial wealth – a number of whom were apparently older individuals or retirees (3rd A. Cmplt., ¶¶ 20-21, 50, 52).

In order to generate the funding required for the investments he proposed, Dawson advised certain clients to liquidate insurance policies and/or annuities. Others, whose mortgages in many cases were fully paid, were instructed to apply for "cash out" type home equity loans – loans which the plaintiffs contend they did not need, were not qualified to receive, and could not repay (3rd A. Cmplt., ¶¶ 52-52, 60; Dawson [March 2008] 70-71, 94-95). Dawson then advised his clients to turn over the funds they had acquired to him, so that he could make the promised investments (*e.g.*, Dawson [April 2, 2008 1st Nat] Dep., 99-100; [March 2008] Dep., 91, 95).

At the loan closings, which Dawson generally attended, lenders often disbursed loan funds by checks payable to Dawson's clients, who would then endorse the checks over to certain Dawson-owned, corporate entities, *i.e.*, to "disbursement" or other

accounts generally maintained at defendant First National Bank of Long Island ["First National"] by codefendants BMG Advisory Services, LTD ["BMG"], Ethan Thomas Co., Inc., ["Ethan"] and/or Brash Management Group, LTD ["Brash"]. In other cases, loan funds were wired at the closings directly to the same Dawson-entity accounts (Dawson [March 2008] Dep., 64-71).

The plaintiffs contend that Dawson not only invested his clients' funds, he also assumed, admittedly with their consent, an unusual and extensive "*de facto*" type control over their personal finances – to the extent that: (1) he opened individual accounts for many clients at codefendant First National; and (2) then made his clients' mortgage payments himself from those accounts (3rd A Cmplt., ¶¶ 50-51, 54, 82; Plea, ¶¶ 104-107).

The relevant loans extended to Dawson's clients at his direction and behest – many of which were conventional, 30-year fixed mortgages – were made and brokered by various lenders and mortgage brokers, including: (1) brokers Oasis Mortgage Corporation ["Oasis"] and Custom Capital Corporation ["Custom Capital"]; and (2) lenders PHH Mortgage Corporation ["PHH"]; Country Wide Home Loans, Inc./Homecomings Financial Network, Inc [collectively "Country Wide"]; and First National.

The complaint alleges that mortgage broker Custom Capital, in particular, had a referral relationship with Dawson through its employee, Michael Laucella, a long-time Dawson acquaintance (from the early 1990's) who had served time for state and federal securities and financial crimes prior to his association with Custom Capital (Laucella Dep.,17-43-44; Dawson [March 2008] Dep., 183-187).

In June of 2001, Dawson wrote to Laucella while Lucella was serving a 46 month, federal prison sentence and suggested that a job would be waiting for him when he was released. Dawson explained that he made the offer because he (Dawson) was a "very good person" who "always helped" people – although Dawson apparently later changed his mind about the job offer (Dawson [March 2008] Dep., 186-190). At some point in 2002, Dawson learned that Laucella had been released from prison and was working for Custom Capital as a loan officer (Plea, ¶¶ 60-65). In the summer of 2002, Laucella wrote to Dawson and requested referrals from him, touting his ability to quickly pre-qualify any referred clients (Dawson [March 2008] Dep., 186-190). According to Laucella, who attended Nassau Community College in the 1970's for one year, he started his employment with Custom Capital by cleaning and maintaining its offices (Laucella Dep., 7-8; 28-30). He ultimately became a Custom Capital loan officer – this despite the fact that the conditions of his federal probation appear to prohibit him from, *inter alia*,

opening any "new lines of credit" (Laucella Dep., 28-30, 34).

Custom Capital itself dealt with some 80 lending institutions and its general practice was to solicit business through contacts with various financial professionals, including Dawson (Laucella Dep., 45-46). Laucella testified that he did not know the nature of the relationship between Custom Capital and the lenders it dealt with. However, Dawson – who depicted Laucella as something of a self-promoter – testified that Laucella told him on a "hundred" occasions and stressed "*ad nauseam*," that he (Laucella) was an agent for "anybody he dealt with" (Dawson [March 2008] Dep., 191-193).

Dawson elaborated on this statement by observing that Laucella was inclined to "sing his own praises" and that "part of his singing" was his oft-repeated claim that he was an agent for all the involved lenders – comments which prompted Dawson to note with a degree of sarcasm that Laucella "might even have said he was vice president * * *" (Dawson [April 3, 2008 PHH] Dep., 138-139). In fact, Laucella claimed at one point that he himself had invested with Dawson and that his widowed mother, with Laucella's assistance, also invested some $90,000.00 with Dawson – although the parties' submissions do not reveal precisely what happened to the invested proceeds (Laucella Dep., 152-153).

Most of the loans relevant to the subject motions were originated by Custom Capital through Laucella. In describing Laucella's method of brokering loans, Dawson claimed that Laucella "didn't care about the people" and was only interested in the "next mortgage" and the income it would generate (Dawson [March 2008] Dep., 197-198). To this end, Laucella's practice was to press for the maximum loan amounts he could obtain (Dawson [March 2008] Dep., 199; [April 3, 2008 PHH] Dep., 135-136). Dawson also claimed that Laucella originated loans without proper inquiry into whether the loans were financially suited to the borrowers' personal, financial circumstances; and in certain instances (*see, Frawley v Dawson, et. al* [decided herewith]), falsified (supposedly without Dawson's knowledge), client income and/or asset statements on loan applications (Dawson [March 2008] Dep., 200-202, 226).

The plaintiffs claim that Laucella continued his employment with Custom Capital and originated certain loans at issue here even after Custom Capital received a September 23, 2005 letter from the New York State Banking Department, which: (1) denied Custom Capital's request to continue Laucella's employment in light of his prior history; and (2) directed Custom Capital to "immediately terminate" him (Laucella Dep., Exh., "H").

The plaintiffs' complaint alleges that while Dawson may have provided services honestly in the past, at some point in 2001 he began to convert the client proceeds which had been entrusted to him (3rd A. Cmplt., ¶¶ 50–51). Instead of investing the client assets,

he removed funds from his First National accounts and used the proceeds for his personal and/or his own business operating expenses – misconduct which he attributed, in part, to: (1) a worsening Xanax addiction; (2) a bi-polar psychological disorder; and (3) the neglect and laxity of the involved financial institutions, brokers and attorneys, who – according to Dawson – allowed the scheme to prosper by failing to intervene and/or supervise him properly and/or "realize how sick * * * [he] was" (Plea Aff., ¶¶ 34-35, 93-95; 144).

At some point in the early 1990's, Dawson entered into what would later evolve into a long-term banking relationship with codefendant First National (Dawson [March 2008] Dep., 63-64; [April 2008] Dep., 38-39). During much of this period, Dawson dealt primarily with First National through branch manager/vice president, Alfred Arena, a codefendant in the consolidated matter commenced by Dorothy Frawley and her son, Michael Frawley (*see,* Dawson [March 2008] Dep., 63-64).

First National made loans to Dawson clients who are now plaintiffs in the various consolidated actions, including the Frawleys, the Haslbauers and the Woods, but according to the plaintiffs, First National's involvement extended beyond that of making loans to Dawson's clients; rather, the plaintiffs contend that as Dawson's "banker" First National, through Arena, was involved in the day-to-day management of Dawson's disbursement and other accounts – accounts whose functionality Dawson relied upon as a key part of his investment and proceed-generating strategy (Dawson (Dawson [March 2008] Dep., 66-68; 73-75, 86 [April 2, 2008 1st Nat] Dep., 116-118).

Specifically, and relying on Dawson's March 2008 testimony, the plaintiffs contend that during the key periods when the thefts were occurring (2001-2006), Arena was aware that the loans were intended as investment vehicles and that they were being sought at Dawson's direction. The plaintiffs further contend that Arena – who "sung * * * [Dawson's] praises" to Dawson's clients – regularly monitored the accounts into which the loan proceeds were deposited, to the extent that during certain time periods, he allegedly spoke to Dawson's office on a daily basis (Dawson [April 2008 1st Nat] Dep., 152-153; [March 2008] Dep., 66-67). Moreover, Arena also possessed first hand knowledge of the operational procedures adopted by Dawson; specifically, that Dawson clients were, *inter alia,* attending loan closings; that they were endorsing checks over to Dawson; and that Dawson had arranged for the funds to be deposited directly into various First National accounts (Dawson [April 2, 2008 1st Nat] Dep., 117-118).

Dawson testified that Arena actually facilitated and attempted to streamline the transfer process by himself suggesting that certain loan proceed checks disbursed by First

National could made out to BMG "for the benefit" of the particular Dawson client/borrower involved. Thereafter, Arena would then allegedly authorize the deposit of those checks directly into Dawson's account with no client endorsement (Dawson [March 2008] Dep., 106-109). The plaintiffs relatedly claim that Arena personally authorized and cleared large, out-of-state checks. In fact, Dawson testified that so long as a check had the "Dawson" name on it, Arena would authorize it for deposit and that Arena would do "just about anything * * * [Dawson] asked" (Dawson [March 2008] Dep., 106-109; Dawson [April 2, 2008 1st Nat] Dep. 160-161).

According to Dawson, Arena also attended client meetings at Dawson's offices on at least 50 occasions over the years to oversee, *inter alia*, the signing of documents and to discuss the client loans or other related matters (Dawson [March 2008] Dep., 70-77, 175, 177; [April 2, 2008 1st Nat] Dep., 115-118). At one point in January of 2004 – when Dawson's entities began bouncing checks – one of Dawson's clients with a First National mortgage, raised questions when a bank clerk apparently told her (correctly) that her mortgage was not being paid (Dawson [March 2008] Dep., 144-150). Arena was supposedly informed of the revelation, and he (together with Dawson) allegedly met with the client at Dawson's offices, where Arena then assured the client that the bank clerk had spoken prematurely; that her credit was unaffected by the missed payment; and that Dawson's business was not in financial trouble at the bank (Dawson [March 2008] Dep., 146-152).

Although Dawson made the ultimate recommendation that his clients apply for First National (and other) loans – and that they turn the loan proceeds over to him – Arena himself allegedly and regularly attempted to solicit mortgages and new accounts from Dawson's pool of clients (Dawson [March 2008] Dep., 64-70; 86). More specifically, it was Arena who allegedly suggested – for convenience sake – that Dawson open individual First National client accounts so as to facilitate the transfer of funds needed to make client mortgage payments (Dawson [March 2008] Dep., 64-68, 175-177). Further, Arena assisted in the securing of collateral assignments needed to facilitate annuity-based loans, which some of Dawson's clients obtained from First National (Dawson [March 2008] Dep., 80-81; [April 2, 2008 1st Nat] Dep., 113-115).

More significantly, Dawson testified that Arena allegedly knew that Dawson was paying certain client mortgage expenses or personal or business expenses out of the account (Dawson [March 2008] Dep., 80-81, 175-176; Plea, ¶¶ 81, 84). In fact, Arena recommended on one occasion that Dawson transfer client funds from the disbursement (client) account to certain operating accounts when Dawson's money resources were

"short" (Dawson [March 2008] Dep., 80-81; [April 2, 2008] Dep., 99-100, 104-106).

Towards the end of 2005 – when he had as many 500 to 1000 clients – perhaps more – the entire "house of cards was falling" and Dawson began systematically "bouncing" checks at First National in sums allegedly in the "millions of dollars" (Dawson [March 2008] Dep., 164-168; [April 3, 2008 PHH] Dep., 33-34). He claims to have discussed his firm's financial quandary with Arena and Arena's supervisor – both of whom allegedly recommended that Dawson take out a $400,000.00 mortgage on his own residence with First National, which he did (Dawson [March 2008] Dep., 166-167). Dawson later deposited those funds, together other personal assets – into the depleted accounts, which the plaintiffs claim allowed him to stay afloat longer and thereby conduct additional loan transactions (Dawson [March 2008] Dep., 164-167, 171).

Prior thereto, and despite generating significant client funding – Dawson testified that he did not use that funding to acquire any investment products for his clients (Dawson [March 2008] Dep., 90-91). When asked whether Arena would have been aware that he was not using the client funds to acquire investments, Dawson replied that since Arena was "intimately involved in * * * [his] account[s,] * * * [h]e had to be aware. Anybody would be aware" (Dawson [March 2008] Dep., 91-94). With respect to the latter assertion, however, Dawson stated that he never told Arena or anyone at his own office that he was engaging in criminal conduct and/or that he was not actually investing the deposited loan proceeds (Dawson [April 2, 2008 1st Nat] Dep., 110-111; [April 3, 2008 PHH] Dep., 32). By mid-2006, Dawson's financial difficulties were so severe that First National finally terminated its relationship with Dawson based upon, *inter alia*, the checks he and/or his entities had bounced (Dawson [March 2008] Dep., 178-182; [April 2] Dep., 100-103; 109). Dawson then moved his banking briefly to Citibank, although according to Dawson, Citibank insisted on doing everything pursuant to "correct banking procedures" and in any event, very shortly thereafter, Citibank declined to do business with him anyway (Dawson [March 2008] Dep., 178-182; [April 2] Dep., 100-103; 109).

In approximately October of 2006, Dawson ceased making client loan payments, after which certain loans allegedly were in danger of falling into default (Plea, ¶¶ 31-33, 133).

Dawson testified, in retrospect, that he did not formulate a premeditated scheme or set out to steal client funds; he originally adopted the strategy of making his client's mortgage payments and creating separate disbursement accounts in order to assist his clients – not to steal from them (Dawson [March 2008] Dep., 80-81;[April 3, 2008 PHH] Dep., 109). In his words, there was no "epiphany moment" when he realized what he had

done – and there was no "rhyme or reason" why he stole from some clients and not others (Dawson [April 3, 2008 PHH] Dep., 21-23; 26-29; 31-33); rather, the process evolved from 2000 or 2001, when his Xanax addiction and personal problems allegedly worsened. Prior to the thefts, he was as "straight as a guy could be;" he attended church (where he met a number of his clients), was family-oriented and never took drugs or drank (Dawson [April 3, 2008 PHH] Dep., 27-28).

Things later spun out of control and the thefts later came into "full bloom" between 2004 and 2006, when Dawson claims to have finally realized what he had done to his clients – a realization which prompted him to attempt suicide in November of 2006 (Dawson [April 2, 2000 1st Nat] Dep., 79-83, 108-109; [April 3, 2008 PHH] Dep., 103; Plea, ¶¶ 134-137).

In December of 2006, Dawson's scheme unraveled and he was arrested in Nassau County, after which he agreed to plead guilty to, *inter alia*, grand larceny in the second degree (involving some 53 victims and covering thefts between January 2005 and December 2006). In exchange, Dawson received a sentence commitment from the Court of 5 to 15 years, together with restitution of some $7.7 million. Dawson also promised "full and complete cooperation in any civil actions" commenced by his victims as a result of his thefts (Plea Agreement, ¶¶ 2-3, 6).

Thereafter, the *Hennessy* plaintiffs commenced the within action against, *inter alia*; Dawson and various lenders and mortgage brokers and other entities who had participated in the loans and/or other investment transactions. Several lawsuits were also commenced by victimized Dawson clients in both State and Federal court, including actions instituted in this court by Lila Miller, Dorothy Frawley and her son Michael Frawley. The Frawley action has since been consolidated herewith pursuant to CPLR 602[a], "for purposes of discovery, conferencing and pre-trial motion practice" (Order of Winslow, J., dated October 10, 2007).

This Court later authorized depositions of both Peter Dawson and Michael Laucella, which have since been conducted and submitted to the Court for its consideration in conjunction with the pending motions (*see,* Order of Winslow, J., dated October 5, 2007). In May of 2009, the within action was removed to the Federal District Court for the Eastern District of New York – although it was subsequently remanded back to this Court by order dated August 17, 2010 (*Hennesey v. Dawson, et., al,* ___F.Supp2d___, 2010 WL 3310713 [E.D.N.Y. 2010]). However, before the removal, various *Miller*, *Frawley*, *Hennessy* defendants had already noticed motions to dismiss the complaint. Those applications are again before the Court for review and resolution. In

addition, this Court supervised, with the Nassau County District Attorney's (DA) office, the bar coding bates stamping, uploading to a restricted web site, available only to the Court and the parties, the 750,000.00 page record of the Peter J. Dawson file maintained and utilized by the DA's office in its prosecution of Mr. Dawson.

Although the motions were largely applications pursuant to CPLR 3211[a], [1], [7], the parties have since consented to the Court's considering the motions as summary judgment applications. Complicating the resolution of the motions is the fact that the parties' submissions – many of which are now several years old – are primarily crafted as motions addressed to the pleadings, which, for the most part, have not been supplemented with revised analysis to reflect the motions' altered, procedural status as summary judgment applications.

In any event, and turning to those dismissal motions, the Court agrees that the lenders have established their entitlement to judgment as a matter of law dismissing the ninth (unconscionability) cause of action, which generally demands declaratory relief voiding the loans as oppressive, unconscionable and/or as issued in violation of the alleged industry wide underwriting standards (3rd A. Cmplt., ¶¶ 260-275). Specifically, the movants' submissions demonstrate, *inter alia,* that: (1) the actual loan terms and conditions were largely conventional in their substantive import; and (2) the complaint does not allege – and there is no evidence showing – that the movants employed deceptive, overbearing or duress-inducing tactics which deprived the plaintiffs of meaningful choice with respect to the loans (*see, Morris v. Snappy Car Rental, Inc.,* 84 NY2d 21, 29-30 [1994]; *Gillman v. Chase Manhattan Bank, N.A.*, 73 NY2d 1, 11-12 [1988];*Citidress II v. 207 Second Ave. Realty Corp.*, 21 AD3d 774).

Similarly, the moving defendants – with the exception of First National – have demonstrated their entitlement to dismissal of the tenth "aiding and abetting" fraud cause of action. The evidence belies the assertion that issues of fact exist as whether these movants possessed the requisite, actual – as opposed to mere constructive – knowledge of Dawson's fraud, and then provided substantial assistance in furtherance of his misconduct (*see, Decana Inc. v. Contogouris,*55 AD3d 325, 326; *Skilled Investors, Inc. v. Bank Julius Baer & Co., Inc.,* 62 AD3d 424, 425; *Lerner v. Fleet Bank, N.A.,* 459 F.3d 273, 292-293 [2nd Cir. 2006]; *In re Agape Litigation,* 681 F.Supp.2d 352, 359 [E.D.N.Y. 2010]; *Chemical Bank v. Bowers*, 228 AD2d 407; *National Westminster Bank USA v. Weksel*, 124 AD2d 144, 148 *see, Rosner v. Bank of China*, ___ F3d ___, 349 Fed.Appx. 637 [2nd Cir. 2009]).

More particularly, the relevant materials submitted – including Dawson's own

testimony – establish that the plaintiffs willingly entered into the subject loan transactions from the outset with the prior knowledge and express expectation that the loan proceeds would be entrusted to Dawson in conformity with his previously disclosed, investment plan (*e.g.*, Dawson [April 2, 2008 1st Nat] Dep., 99-100 [March 2008] Dep., 91, 95). Further, Dawson plainly stated that, *inter alia*, he never disclosed to anyone that he was stealing loan proceeds from clients; that he generally avoided direct contact or communication with mortgage lenders; and that, in fact, he himself had not formulated any concrete intent to convert the proceeds when the various client loans loan were originally made (Dawson [April 3, 2008 PHH] Dep., 21-22, 31-32; 36).

The fact that, the loan proceeds were transferred to Dawson at closings conducted in his offices (and in the plaintiffs' presence); that Dawson attended the closings as the plaintiffs' financial planner – or that the movants allegedly knew the loans were investment vehicles – are not factors supporting a non-speculative inference that the defendants therefore possessed actual knowledge of Dawson's self-described, undisclosed intent to convert the proceeds. If anything, the inference to be drawn by those privy to these facts was that the plaintiffs were voluntarily participating in the loan transactions as counseled investors; specifically, that they were individuals who had presumably received professional advice relating to the wisdom of the transaction from their own, personal financial planner, who was in attendance as their counselor.

Although the plaintiffs were not represented by counsel at the closings, to the extent discernable by third parties, the plaintiffs were uncounseled, but rather, were accompanied by their expert advisor; namely, Dawson – the architect of the investment strategy and a person with whom many of the plaintiffs had developed a long-term, investing relationship of trust. In any event, there is no "constitutional, statutory or regulatory requirement that a borrower be represented by legal counsel in relation to a mortgage loan transaction" (*Eastern Savings Bank, FSB v. Aguirre*, ___Misc3d___, 2011 WL 723595 [Supreme Court, Queens County 2011]).

Additionally, since the typical relationship between a lender and borrower is contractual in nature (*Dobroshi v. Bank of America, N.A.*, 65 AD3d 882, 884), a bank is generally not "accountable for the ways in which its customers manage their accounts" (*Renner v. Chase Manhattan Bank*, ___ F.Supp.2d___, 1999 WL 47239, at 14 [S.D.N.Y. 1999]; *Diamore Realty Corp. v. Stern*, 50 AD3d 621, 622; *Century Business Credit Corp. v. North Fork Bank*, 246 AD2d 395, 396). Nor, upon the facts presented here, is a bank duty-bound "to monitor funds held in trust by a fiduciary so as to safeguard them from misappropriation" – even with respect to funds held in accounts "maintained at * * * its

[own] branches * * *" (*Diamore Realty Corp. v. Stern, supra,* 50 AD3d 621

The plaintiffs have not shown why a borrower who acquires loan proceeds at a closing would not be entitled to dispose of those funds as he or she sees fit – or why a lender, or a lender's counsel, would be duty-bound to oversee or monitor a borrower's ostensibly counseled choices with respect to the investment of those loan funds (*Diamore Realty Corp. v. Stern, supra,* 50 AD3d 621 *see, Thomas v. Lasalle Bank Nat. Ass'n*, 79 AD3d 1015). Moreover, in certain cases, the fund transfers were memorialized by executed, HUD-1 closing statements by which the plaintiffs authorized the transfers (*e.g.*, Agostinelli Hardship Aff., Exh., "B").

The assertion that lender liability nevertheless exists within this context is attenuated because neither Homecomings nor PHH was a depository bank – a bank in which the client funds were actually being maintained when the injury-causing diversion or misconduct occurred. Rather, Homecomings and PHH were lenders who dispensed the proceeds at loan closings (*Lerner v. Fleet Bank, N.A., supra,* at 287). Also unpersuasive is the plaintiffs' claim that the dispensing lenders were on notice of Dawson's fraud because they allegedly knew the disbursed loan funds were being commingled or pooled with other investor funds in accounts maintained by certain Dawson entities at other banking institutions.

Although it is not entirely clear on what specific theory the commingling claim is based, tortious commingling generally involves more than the pooling of client trust funds into a single account (*see Matter of Knox, supra*; *Bradford Trust Co. v. Citibank, N.A., supra*, 60 NY2d at 870). Rather, misconduct emblematic of actionable commingling generally occurs when, *inter alia,* a fiduciary diverts and/or misappropriates the funds held in depositary account or fails to properly segregate them from his or her own personal assets (*e.g.*, *Paterno v. Carroll*, 75 AD3d 625, 627-628; General Obligations Law § 7-103; *In re Schacht*, 80 AD3d 157, 160). In any event, assuming that Dawson violated some specific imposed duty he owed to the plaintiffs by pooling the fund deposits, the plaintiffs have not demonstrated why lenders dispensing funds at a closing (as opposed to banks later holding the funds), would be accountable for a fiduciary's subsequent mishandling of client assets held and managed at a different banking institution (*see, Lerner v. Fleet Bank, N.A., supra,* at 287).

Similarly, the evidence adduced does not support the assertion that either Laucella or Oasis, as mortgage brokers, possessed actual knowledge of Dawson's thefts or that either were agents of the lenders so as to support a theory of imputed, aiding and abetting (fraud) liability. Indeed, if Laucella's testimony is to be credited, he himself apparently

invested his own funds and those of his widowed mother, with Dawson (Laucella Dep., 152-153). Although Oasis entered into a written brokerage contract with the Agostinellis, the record does not support the assertion that Oasis also functioned as a lender's agent or, that it possessed actual knowledge of Dawson's fraud and then knowingly provided substantial assistance in furtherance of that fraud by originating loans.

As to PHH and Custom Capital, the parties' written agreement – which sets forth requirements relating to loans originated by Custom Capital – plainly states that the relationship between PHH and Custom Capital, was to be "one of independent contractor [and] [n]either party is the legal representative or agent of, or has the power to obligate (or has the right to direct or supervise the daily affairs of the other * * *" (*see*, "Cedent Mortgage Program Agreement," ¶ 14[g], at 7).

Dawson's testimony with respect to what Laucella supposedly told him about Custom Capital's alleged agency, is inconsistent with the terms of the parties' written agreement and Laucella's own first-hand testimony, in which Laucella stated, *inter alia,* that he did not know the precise nature of Customs Capital's relationship with PHH, and that as a loan officer, he lacked the capacity to speak relative to his employer's relationship with PHH or any bank (Laucella [Dec. 2007] Dep., 104-105). The plaintiffs' agency allegations relating to Ida D'Angelo and her former employee, associate, Orlando Morales – both of whom represented PHH at certain closings – are also lacking in merit. Although D'Angelo was criminally indicted and later disbarred, her misconduct arose out of an unrelated matter actually perpetrated against lender banks though the use of fictitious or "straw" borrowers (3rd A. Cmplt., ¶¶ 66-68). The complaint itself does not allege that D'Angelo (or Morales) actually possessed knowledge of the alleged Dawson scheme in this matter and the plaintiffs' current claims relative to their involvement are circular and obscure.

However, and viewing the evidence in a light most favorable to the plaintiffs, issues of fact exist as to the plaintiffs' contentions that First National – a depository bank – possessed knowledge through its employee, Alfred Arena, sufficient to: (1) establish the bank's potentially complicit involvement as an aider or abetter; and/or (2) trigger a negligence-based duty of inquiry which, if timely exercised, might have prevented Dawson from further dissipating the client disbursement accounts (*Home Sav. of America, FSB v. Amorous, supra*).

Notably, "[l]iability may be imposed if a depositary bank has actual knowledge or notice that a diversion will occur or is ongoing" which may exist when there is "a chronic insufficiency of funds, or payment of the fiduciary's personal obligations to the depositary

bank from the escrow account" (*Norwest Mortgage, Inc. v. Dime Sav. Bank of New York*, 280 AD2d 653, 654.

Here, the extensive testimonial evidence provided by Dawson over the course of several depositions, has generated factual questions with respect to the precise nature of First National's knowledge of Dawson's scheme. According to Dawson, Alfred Arena – First National's branch manager who has yet to be deposed – possessed a detailed and intimate knowledge of Dawson's plan and knew that the deposits were being held as client funds for investment (*Lerner v. Fleet Bank, N.A., supra*, 459 F.3d at 289). Specifically, Dawson testified that, *inter alia*, Arena participated in and facilitated a broad array of banking activities in furtherance of the closing fund transfers; that he assisted the entire investment/loan process and did so with knowledge, *inter alia*, that funds had being misdirected to defray Dawson's personal business expenses; that he was aware that investments were never actually purchased with the funds deposited; and that he was also aware that Dawson's accounts were ultimately beset by significant deficiencies (*Home Sav. of America, FSB v. Amorous, supra*, 233 AD2d at 41; *Zaz-Huff Inc. v. Chase Manhattan Bank, N.A., supra*). The Court notes that discovery at this juncture has been limited to date, with the various banks, most brokers and the plaintiffs, not having as yet, submitted to depositions (*Rodriguez v. DeStefano*, 72 AD3d 926; *Metichecchia v. Palmeri*, 23 AD3d 894, 895).

That branch of Oasis' motion which is to dismiss the eleventh (breach of contract) cause of action should also be denied at this juncture, since there exist unresolved factual issues with respect to the manner in which a $468,000.00, no income verification Agostinelli "refinance" loan was processed (3rd A. Cmplt., ¶¶ 283-284). Included among those services which Oasis was authorized to provide under its written fee agreement, were advice and counseling services relating to: (1) available mortgage products; (2) general mortgage qualifications; (3) financial capabilities; and (4) processing of the loan application. Although the agreement states that these services "may *include*, but are not limited to" these previously listed, the plaintiffs allege that in light of the substantial ($7,020.00) fee charged, there were no meaningful services provided at all [emphasis added].Specifically, the plaintiffs contend that Oasis collected and processed inaccurate and/or fabricated financial information; that Oasis never properly authenticated or verified that information; and that, in substance, its allegedly improper conduct effectively deprived the plaintiffs of their ability to receive a proper benefit under the agreement since the Agostinellis lacked the income to support the loan (Zamansky Aff.,¶¶ 11-14).

The plaintiffs further assert that Oasis overstated their bank account resources and relied upon – but never verified – a Dawson-authored letter falsely warranting that the Agostinellis had over $170,000.00 worth of investments with Dawson (Agostinelli Aff.,¶¶ 17-19, Exh., "G"]).

Whether Oasis breached its duty to provide the services referenced in the agreement, cannot be summarily resolved at this juncture since, the record is insufficient to determine, as a matter of law, exactly what transpired with respect to the processing and origination of the loan.

The fourteenth cause of action, interposed as against all lenders and brokers, is entitled, "Breach of Suitability Obligations" and alleges that all the defendants collectively owed the plaintiffs a duty of care based solely – at least as pleaded – on undescribed industry standards and practices (3rd A. Cmplt., ¶¶ 289-300). In opposition to the defendants' *prima facie* showing, the plaintiffs have failed to demonstrate that a tort-based negligence duty arose by virtue of applicable industry standards and customs. While in general, "evidence of industry practice and standards" is admissible to establish a duty of care" grounded on negligence (*e.g., AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 NY3d 582, 594 [2005]), the expert affirmation submitted by the plaintiffs in support of this theory has been prepared by a real estate attorney – not an individual possessing documented expertise, knowledge and/or training in the process of professionally underwriting or originating loans or mortgages (*see, Diaz v. New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Fotiatis v. Cambridge Hall Tenants Corp.*, 70 AD3d 631, 632). Moreover, the expert's statements are largely conclusory and appear to be based on personal opinions and anecdotal observations collected during the expert's law practice, rather than probative, empirical data (*e.g.*, Hecht Aff., ¶¶ 2-4)(*Fotiatis v. Cambridge Hall Tenants Corp., supra*). Accordingly, and insofar as actually pleaded, the fourteenth cause of action should be dismissed as against all movants.

However, upon favorably construing the fifteenth negligence cause of action, and at least pending further discovery, the Court agrees that the defendants have failed to establish that an independent tort duty did *not* arise out of the parties' contractual relationships; specifically, a tort duty requiring the exercise of due care in collecting, processing and adequately verifying loan information or underwriting criteria so as to avoid the making of loans likely foreseeable to result in the proximately ensuing financial injury.

Although the typical lending relationship is contractual in nature (*Dobroshi v. Bank of America, N.A., supra,* 65 AD3d 882, 884), "borderland situations" may arise

where "[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship" (*Sommer v. Federal Signal Corp.*, 79 NY2d 540, 551 [1992]), *i.e.*, a "separate tort liability" attributable to "circumstances extraneous to, and not constituting elements of, the contract" although related or dependent on it (*Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 NY2d 382, 389-390 [1987] *see, AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 11 NY3d 146, 159 [2008]).

In framing their submissions, the parties have focused upon the term "suitability," but attaching undue significance to labels or catchwords in this context is counterproductive (*Sommer v. Federal Signal Corp.*, *supra*, 79 NY2d at 551 *see, Morejon v. Rais Const. Co.*, 7 NY3d 203, 211 [2006]). Distilled to its essence, "[a] tort obligation" is simply "a duty imposed by law to avoid causing injury to others" – although whether a duty exists in a given case is for the Court to decide, and will often depend on a complex amalgam of competing factors or policy considerations (*Sanchez v. State of New York*, 99 NY2d 247, 252 [2002]; *Hamilton v. Beretta U.S.A. Corp.*, 96 NY2d 222, 232-233 [2001] *New York University v. Continental Ins. Co.*, 87 NY2d 308, 316-318 [1995]).

Here, in this "complex mortgage fraud case" (*Hennesey v. Dawson*, 2010 WL 3310713, at 1)[Seybert, J.]), the plaintiffs are not necessarily attempting to "transmogrify * * * [a] contract claim into one for tort" (*Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897, 899 [2nd Cir. 1980] *cf., New York University v. Continental Ins. Co.*, 87 NY2d 308, 316-318 [1995]). Rather, they claim injury derived from "other kinds of harm" (*Hargrave v. Oki Nursery, Inc.*, *supra*, at 899), *i.e.*, injury attributable to a failure to exercise due care in recommending, originating and/or underwriting loans, which is arguably distinct from the obligations set forth in, or impliedly derived from, the parties' written agreements (*e.g., AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 11 NY3d at 159; *Sommer v. Federal Signal Corp.*, *supra*; *Camp Kennybrook Inc. v. Kuller*, 214 AD2d 264; *Sacher v. Beacon Associates Management Corp.*, ___Misc.3d___, 2010 WL 1881951 at 13. Significantly, the Courts have held that banks do owe duties of care to their own customers (*Dubai Islamic Bank v. Citibank, N.A.*, 126 F.Supp.2d 659, 667 [S.D.N.Y. 2000]).

Moreover, there is a public interest in ensuring the alleged duties relied upon are "performed with reasonable care" (*New York University v. Continental Ins. Co.*, *supra*, 87 NY2d at 316-318) – as evidenced by the recent flurry of consumer-oriented laws and amendments enacted in the wake of the "subprime mortgage meltdown" which, analogously, require lenders and brokers to originate and/or underwrite covered loans with

properly verified data, and to consider, a borrower's financial resources; the "tangible benefit" of a covered loan; and the borrower's ability to repay it (*see generally,* Banking Law §§ 6-l2[k]; 6-l [2][i]; 6-m[2][j]; 6-m[4][a]-[d]; 590-b; 595-a; RPAPL §§ 1302, 1304; CPLR 3408 *see also*, Legislative Memorandum, Senate Memorandum in Support, McKinney's Sessions Laws of 2008, ch., 472, at 2135-2139).

With these considerations in mind, and in light of the absence of a complete and clarifying discovery record; the "CPLR 3211-type" focus of the parties' principal submissions in spite of the 3212 conversion; and potentially interrelated nature and scope of the transactions at issue, the Court finds that any determinative conclusion at this juncture would be premature (*Dubai Islamic Bank v. Citibank, N.A., supra*, 126 F.Supp.2d 659, 667). Indeed, as presently constituted, the parties' submissions read as a thicket of conflicting allegations with respect to, (1) precisely how the loan applications were completed and from whom the information presented to the lenders was obtained; (2) whether false or incomplete information was submitted to – and then improperly incorporated into – the underwriting or origination process absent due care; (3) whether circumstances existed which should have alerted the movants to issues in the plaintiffs' financial information; (4) what underwriting considerations, if any, were utilized by the brokers who originated the plaintiffs' loans and the nature of their relationship with Dawson; and (5) the knowledge possessed by the plaintiffs and the role they may have played by participating in the transactions and transfers as profit-generating, investment vehicles (*see, Morales v. AMS Mortg. Services, Inc.*, 69 AD3d 691, 692-693; *Deutsche Bank Nat. Trust Co. v. Sinclair*, 68 AD3d 914, 916).

Lastly, although the movants assert that Dawson's thefts were the exclusive source of the plaintiffs' injuries, the fair import of the plaintiffs' negligence allegations – as amplified by their affidavits and opposing submissions – is that irrespective of Dawson's thefts, they have sustained a separately existing injury directly attributable to the allegedly improvident loans, many of which, it should be noted, were being paid by Dawson prior to 2006. In any event, it is settled that the issue of proximate cause is one for the trier of fact "where varying inferences are possible" (*Mirand v. City of New York*, 84 NY2d 44, 51 [1994]), and that a plaintiff "need not positively exclude every other possible cause of" an injury (*Gayle v. City of New York*, 92 NY2d 936, 937 [1998]). In sum, whether the plaintiffs can ultimately adduce proof establishing that the defendants' breached a duty of care which proximately caused them compensable injury, is a question which must await further discovery and the prospect of a trial (*AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., supra,* 11 NY3d at 159 *see, Dubai Islamic Bank v. Citibank, N.A., supra*, at 667; *In re Fasciglione*, 73 AD3d 769).

There are, however, no allegations in the complaint expressly attributing the existence of an alleged "suitability duty" to any specific statutory sources (3rd A. Cmplt., ¶¶ 301-306) – although the plaintiffs mention, largely in shotgun fashion, several federal, state and regulatory enactments in their opposing submissions (*e.g.,* 15 U.S. C. § 1639[h]; Banking Law, § 6-l). The defendants have also addressed these enactments, but have generally done so in attorney affirmations and memoranda of law, which do not detail the specific threshold criteria considered and/or lay out for the Court's review, the computational analyses and raw figures employed to derive the results reached.

Significantly, both the "Truth in Lending Act" ["TILA"]/Homeowners Equity Protection Act ["HOEPA"], 15 U.S.C § 1639[h] and the "procedurally complex" Banking Law § 6-l , require threshold analysis implicating a constellation of fact-intensive criteria, "[a]ny combination or permutation" of which might "cause a mortgage to meet the definition[s]" prescribed by either statute (*Wells Fargo Bank v. Emmet, supra see, LaSalle Bank, N.A., II v. Shearon*, 23 Misc.3d 959, 965-966 [Supreme Court, Richmond County 2009]). Considering, the "variables and * * * complexities" involved, and the comparatively superficial nature of the parties' submissions to date, "the Court will not (nor should it be expected to) flippantly draw its own conclusions as to whether or not the loan[s] at issue" meet the relevant definitional criteria (*Wells Fargo Bank v. Emmet, supra*).

Nevertheless, in the interests of justice and to clarify and sharpen the issues, the plaintiffs – if they be so advised – may move for leave to serve an amended complaint containing a separately pleaded cause of action grounded upon those specific, statutory enactments which they contend are applicable to the various loans at issue here (*see, Alvord and Swift v. Stewart M. Muller Const. Co., Inc.*, 46 NY2d 276, 281 [1978]; *Bennardi & Associates, Inc. v. Ramsons One, Inc.,* 8 AD3d 948, 949; *Raymond Babtkis Associates, Inc. v. Tarazi Realty Corp.*, 34 AD2d 754). The plaintiffs' application, if any, shall be made, within 20 days of service of this Order after entry. The Court agrees, however, that the "Know Your Customer" and/or other rules promulgated by self-regulated securities agencies such New York Stock Exchange and National Association of Securities Dealers, have no application within a mortgage context; nor are those rules generally enforceable "by private litigants through civil actions" (*Welch v. TD Ameritrade Holding Corp.*, ___ F.Supp2d___, 2009 WL 2356131, at 47-48 [S.D.N.Y. 2009])(*see*, 3rd A. Cmplt., ¶ 299) no matter how persuasive that approach may be.

The motion by codefendant Invest pursuant to CPLR 3211 and 3212 to dismiss the complaint insofar as interposed against it should also be granted, *i.e.*, the complaint's theory that it is liable as 21st Century's corporate successor based upon its acquisition of

most of 21st Century's former representatives and their customer accounts in the summer of 2005.

The well settled general rule is that a corporation which acquires the assets of another is not liable for the torts of its predecessor" (*Schumacher v. Richards Shear Co., Inc.*, 59 NY2d 239, 244-245 [1983] *see, Semenetz v. Sherling & Walden, Inc.*, 7 NY3d 194, 198 [2006]. There are exceptions to the rule, which "arise where a successor corporation 'expressly or impliedly assume[s] [its] predecessor's tort liability'; or 'there [is] a consolidation or merger of seller and purchaser'; or "the purchasing corporation [is] a mere continuation of the selling corporation'; or 'the transaction is entered into fraudulently to escape such obligations'" (*Semenetz v. Sherling & Walden, Inc., supra*, 7 NY3d at 198, *quoting* from, *Schumacher v. Richards Shear Co., Inc., supra,* at 245. Here, the record demonstrates that Dawson was not an Invest employee and that he was not associated with Invest after leaving Century 21. Further, to the extent that the continuity of ownership exception is pleaded or relied upon, that principle is inapplicable since Century 21 has not been extinguished as an existing or active corporate entity and the former representatives retained by Invest as independent contractors acquired no stock or other ownership interest in Invest (*Schumacher v. Richards Shear Co., Inc., supra*, 59 NY2d at 244-245; *Douglas v. Stamco, supra*). Nor does the evidence support the assertion that Invest expressly or impliedly assumed a predecessor's tort liability; that there was a consolidation or *de facto* merger (*Washington Mut. Bank, F.A. v. SIB Mortg. Corp., supra*; *Douglas v. Stamco, supra*); or that the 2005 transaction was a fraudulent attempt to escape liability (*Kretzmer v. Firesafe Products Corp.*, 24 AD3d 158, 159). In opposition to Invest's motion, the plaintiffs have failed to raise a triable issue of fact. Accordingly, the complaint should be dismissed insofar as interposed against Invest.

The branches of the defendants' motions to strike the plaintiffs' punitive damages demand are denied at this juncture with leave to renew upon the conduct of further discovery (*see, Sherry Associates v. Sherry-Netherland, Inc.,* 273 AD2d 14, 15; *O'Brien v. Jack LaLanne Fitness Centers, Inc.*, 237 AD2d 587). Significantly "[p]unitive damages are allowable in tort cases," even absent intentionally harmful conduct, "so long as the very high threshold of moral culpability is satisfied" (*Giblin v Murphy*, 73 NY2d 769.)

However, that branch of PHH's motion which is to strike references in the complaint to Ida D'Angelo/Orlando Morales, should be granted (CPLR 3024[b]; 3rd A. Cmplt.,¶¶ 66-68). "In reviewing a motion pursuant to CPLR 3024[b] the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of

action" (*Soumayah v. Minnelli*, 41 AD3d 390, 392-393 *see, Kinzer v. Bederman,* 59 AD3d 496, 497). As the record currently exists, De'Angelo's unrelated indictment and Morales' involvement with her, bear no demonstrated nexus to the plaintiffs' claims as against PHH and should be stricken. The Court's holding should not be read, however, as a finding that "if said evidentiary matter[s] should become relevant at the trial, they cannot be proved without being specifically alleged in the amended complaint", if any (*Soumayah v. Minnelli, supra see, Van Caloen v. Poglinco*, 214 AD2d 555, 557; *JC Mfg., Inc. v. NPI Elec., Inc.*, 178 AD2d 505, 506).

Finally, the plaintiffs have cross moved pursuant to CPLR 3025[b] for (1) leave to amend their complaint by substituting non-parties Indymac Federal Bank, F.S.B. and JPMorgan Chase Bank, N.A. for, respectively, the currently named defendants, Indymac Bank and Washington Mutual, Inc; and (2) for permission to add as party defendants, American Mortgage Network; Wachovia Bank, N.A., and Citibank, N.A. In general, leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment (*e.g., Rodriguez v. Panjo*, 81 AD3d 805; *Kinzelberg v. Design Quest, Ltd.,* 67 AD3d 743; *Merchants Bank of New York v. Rosenberg*, 31 AD3d 507, 509 *see also*, CPLR 3025[b]; CPLR 1003). In the exercise of the Court's discretion, the motion to amend the complaint by substituting or adding parties is granted (*Kinzelberg v. Design Quest, Ltd., supra*). The motion is denied, however, with respect to Citibank, N.A., inasmuch as the evidence belies the assertion that there is any potential merit to the alleged theories of liability of this proposed defendant.

Lastly, the Court declines to impose sanctions upon the plaintiffs, as requested by codefendant PHH. The Court has considered parties' remaining contentions and concludes they do not warrant the granting of relief in excess of that awarded above.
Accordingly, it is,

ORDERED that the motions by the defendants PHH, Country Wide Home Loans, Inc./Homecomings Financial Network, Inc. and First National are **granted** to the extent that (1) the ninth, tenth, and fourteenth causes of action are **dismissed** insofar as asserted against them; and (2) the branch of PHH's motion which is to strike stated allegations in the complaint pursuant to CPLR 3024[b] is **granted** in accord herewith; and the motions are otherwise **denied**; and it is further,

ORDERED that the motion by the defendant Oasis Mortgage, Inc., is **granted** to the extent that the tenth and fourteenth causes of action are **dismissed** insofar as interposed against it, and the motion is otherwise **denied**; and it is further,

ORDERED that the motion by the defendant Invest Financial Corporation for an order dismissing the complaint insofar as asserted against it, is **granted** and it is further,

ORDERED that the cross motion by the plaintiffs for an order, *inter alia,* granting them leave to amend their complaint by adding and substituting stated entities as party defendants, is **granted** with the exception of Citibank, N.A., and it is further,

DECLARED that insofar as reviewed and upon the applications before the Court, the loans made by the relevant movants are not void as unconscionable upon the grounds specified in the ninth cause of action.

All counsel or pro-se parties remaining after this and the other two, Frawley and Miller decisions shall appear in this part for a compliance conference on June 28, 2011. Appearance must be by someone with knowledge and authority.

This constitutes the Order of the Court.

Dated: May 20, 2011

J.S.C.

ENTERED

JUN 22 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE