

APPENDIX



Bruce and Cynthia Warren, Plaintiffs, vs. Sierra Pacific Mortgage Services Incorporated FN, et al., Defendants.

No. CV-10-02095-PHX-NVW

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

2011 U.S. Dist. LEXIS 44407

April 22, 2011, Decided

April 22, 2011, Filed

PRIOR HISTORY: *Warren v. Sierra Pac. Mortg. Servs. Inc. FN, 2010 U.S. Dist. LEXIS 121742 (D. Ariz., Nov. 12, 2010)*

COUNSEL: [*1] For Bruce Warren, husband, Cynthia Warren, wife, Plaintiffs: Donald O Loeb, Campana Vieh & Loeb PLC, Scottsdale, AZ.

For Sierra Pacific Mortgage Services Incorporated FN, named as: Sierra Pacific Mortgage Services, Inc. FN/ a California corporation, Defendant: John Patrick Flynn, Peter Jon Moolenaar, Todd Alan Williams, Dioguardi Flynn LLP, Scottsdale, AZ; Laura Elizabeth Sixkiller, Greenberg Traurig LLP, Phoenix, AZ.

For Federal Home Loan Mortgage Corporation, FHLMC/ Freddie Mac, also known as Freddie Mac, Mortgage Electronic Registration Systems Incorporated, named as: Mortgage Electronic Registration System, Inc. (MERS)/ a Delaware corporation, CitiMortgage Incorporated, named as: Citimortgage, Inc. (Citimortgage), Defendants: Brian Jay Schulman, Laura Elizabeth Sixkiller, Greenberg Traurig LLP, Phoenix, AZ.

JUDGES: Neil V. Wake, United States District Judge.

OPINION BY: Neil V. Wake

OPINION

ORDER

Before the Court is Defendant Sierra Pacific Mortgage Services Inc.'s ("Sierra Pacific") Motion to Dismiss (Doc. 15), Defendant Sierra Pacific's Motion to Dismiss First Amended Complaint (Doc. 28), and Defendants

Federal Home Loan Mortgage Corporation ("Freddie Mac"), Mortgage Electronic Registration System, Inc. ("MERS"), [*2] and CitiMortgage, Inc.'s ("CitiMortgage") Second Motion to Dismiss with Prejudice (Doc. 31). For the reasons stated below, Defendants' motions to dismiss will be granted with prejudice.

I. Background

On November 5, 2008, Plaintiffs executed a promissory note and deed of trust in the amount of \$370,350.00, secured by property located at 35115 North 138th Way, Scottsdale, Arizona, 85262. The original lender is Sierra Pacific. The note and deed of trust were transferred to Freddie Mac, with CitiMortgage as the loan servicer. At some point, Plaintiffs fell behind on their mortgage payments. MERS assigned all beneficial interest in the deed of trust to CitiMortgage on April 11, 2010. Foreclosure proceedings were commenced with respect to Plaintiffs' property shortly thereafter. Michael Bosco, Jr., as trustee, recorded a Notice of Trustee's Sale of the property on May 18, 2010. Mr. Bosco set the date of the trustee's sale for September 17, 2010.

Plaintiffs filed suit in Maricopa County Superior Court on September 16, 2010. Plaintiffs' original complaint sought injunctive and declaratory relief and raised claims for breach of contract, "payment/cancellation of mortgage loan," negligent misrepresentation, [*3] fraudulent concealment, and appraisal fraud. Plaintiffs also filed an *ex parte* application for a temporary restraining order to enjoin the trustee's sale. The temporary restraining order was granted by the Maricopa County Superior Court on September 16, 2010. (Doc. 1.) The September 17, 2010 trustee's sale was postponed and no subsequent trustee's sale has taken place. Defendants removed to this

Court on September 29, 2010. (Doc. 1.) Freddie Mac, MERS, and CitiMortgage moved to dismiss all of Plaintiffs' claims on October 12, 2010 (Doc. 14). The Court granted Defendants' motion in its November 15, 2010 order (Doc. 17), citing Plaintiffs' failure to comply with the federal pleading rules and failure to state a plausible claim for relief.

Sierra Pacific filed a separate motion to dismiss Plaintiffs' original complaint on November 2, 2010. (Doc. 15.) Before that motion was fully briefed, Plaintiffs filed their first amended complaint. (Doc. 23.) Plaintiffs' first amended complaint listed eleven counts: Count One -- Jurisdiction and Summary of Allegations; Count Two -- Declaratory Judgment; Count Three -- Renewed Request for Injunctive Relief; Count Four -- Breach of Contract and Lack of Authority [*4] to Act as Agent; Count Five -- Violation of Statute; Count Six -- Assignment to the Multi-District Litigation; Count Seven -- Fraud; Count Eight -- Absence of Agency/Lack of Authority to Non-Judicially Foreclose Plaintiffs' Deed of Trust; Count Nine -- Bifurcation/Splitting of the Promissory Note and Deed of Trust Barring Defendants from Attempting to Non-Judicially Foreclose Sierra Pacific's Beneficial Interest in Plaintiffs' Home Mortgage Loan; Count Ten - The Conclusive Presumption of Compliance with Title 33, Chap. 6.1 is Unconstitutional as Applied as a Violation of the Separation/Distribution of Powers Doctrine Contained in Art. 3 and Art. 4, Pt. 2, Section 19(5) of the Constitution of the States (*sic*) of Arizona; and Count Eleven -- Breach of Contract. (Doc. 23.) All Defendants filed new motions to dismiss Plaintiff's first amended complaint. (Docs. 28, 31.)

II. Legal Standards

A. Rule 8, Federal Rules of Civil Procedure

A claim must be stated clearly enough to provide each defendant fair opportunity to frame a responsive pleading. *McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996). "Something labeled a complaint . . . , yet without simplicity, conciseness and clarity as to whom plaintiffs [*5] are suing for what wrongs, fails to perform the essential functions of a complaint." *Id.* at 1180. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. "Each allegation must be simple, concise, and direct." *Fed. R. Civ. P. 8(d)(1)*. A complaint having the factual elements of a cause of action present but scattered throughout the complaint and not organized into a "short and plain statement of the claim" may be dismissed for failure to satisfy *Rule 8(a)*. *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988).

B. Rule 9(b), Federal Rules of Civil Procedure

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. *Rule 9(b)* requires allegations of fraud to be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001). "While statements of the time, place and nature of the alleged fraudulent activities [*6] are sufficient, mere conclusory allegations of fraud are insufficient." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). Further,

Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud. In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme.

Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal quotations, alterations, and citations omitted).

C. Rule 12(b)(6), Federal Rules of Civil Procedure

On a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, all allegations of material fact are assumed to be true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Dismissal under *Rule 12(b)(6)* can be based on "the lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). [*7] To avoid dismissal, a complaint need contain only "enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The principle that a court accepts as true all of the allegations in a complaint does not apply to legal conclusions or conclusory factual allegations. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has

acted unlawfully." *Id.* To show that the plaintiff is entitled to relief, the complaint must permit the court to infer more than the mere possibility of misconduct. *Id.*

III. Sierra Pacific's Motions to Dismiss

Sierra Pacific filed a motion to dismiss Plaintiffs' original complaint on November 2, 2010. (Doc. 15.) However, Plaintiffs did not file a response to Sierra Pacific's motion to dismiss. Instead, [*8] pursuant to this Court's November 15, 2010 order (Doc. 17) dismissing Defendants Freddie Mac, MERS, and CitiMortgage, Plaintiffs filed an amended complaint against all Defendants on December 13, 2010 (Doc. 23). Sierra Pacific thereafter filed a motion to dismiss the amended complaint (Doc. 28) wherein it acknowledged that its original motion to dismiss was moot. Accordingly, the Court will dismiss Sierra Pacific's original motion to dismiss (Doc. 15) as moot.

In their amended complaint, Plaintiffs have failed to plead any plausible causes of action against Sierra Pacific. None of the five counts directed at Sierra Pacific constitutes a legitimate, independent legal cause of action. Count One is simply a recitation of the basis for this Court's jurisdiction and a summary of the allegations against Defendants. To the extent Count One can be read as a separate cause of action, Plaintiffs have alleged that Defendants

...have failed to follow the contractually required two-part notice procedure prescribed in §22 of the Deed of Trust which requires, first, giving notice of default and opportunity to cure, and second, giving notice of intent to exercise the trustee's power of sale along with [*9] notice to the borrowers of their "RIGHT TO BRING A COURT ACTION (emphasis added) to assert the non-existence of a default or any other defense of borrower to acceleration and sale" which failure constitutes a breach of the contract between the parties represented by the Deed of Trust....

(Compl. ¶ 37). In order to state a claim for breach of contract, a plaintiff must allege the existence of a contract between the plaintiff and defendant, a breach of the contract by the defendant, and resulting damage to the plaintiff. *See Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, 83 P.3d 1103, 1111 (Ariz. App. Ct. 2004). Plaintiffs have failed to and cannot at this time allege damages stemming from this alleged breach of the deed of trust. Here, Plaintiffs claim that the May 18, 2010 Statement of

Breach or Non Performance "was served upon Plaintiffs after May 18, 2010 . . . giving Plaintiffs no time within which to cure any alleged default in making payments under the Note" and that the notice did not contain the "required information regarding the Plaintiffs' right to bring a court action" challenging the sale. (Compl. ¶ 10). In this case, the non-judicial foreclosure originally scheduled for [*10] August 17, 2010 did not occur. Because the foreclosure did not occur as scheduled, Plaintiffs did not suffer damages from Defendants' alleged breach of notification obligations under the deed of trust; such damages would arise only if foreclosure occurred without the required notice. As Plaintiffs exercised their rights to bring suit challenging the foreclosure sale and have had time to cure their default, they have failed to allege any damages arising from any purported breach of notification obligations. *See Dumont v. HSBC Mortg. Corp., USA*, No. CV10-1106-PHX-MHM, 2010 U.S. Dist. LEXIS 77805, 2010 WL 3023885 (D. Ariz. Aug. 2, 2010)

Counts Two and Three request declaratory and injunctive relief, but, as this Court previously noted, Plaintiffs cannot plead independent causes of action for injunctive and declaratory relief because these are "remedies for underlying causes of action . . . not separate causes of action[.]" *Silvas v. GMAC Mortg., LLC*, No. CV-09-0265-PHX-GMS, 2009 U.S. Dist. LEXIS 118854, 2009 WL 4573234, at *6 (D. Ariz. Dec. 1, 2009) (citations omitted). Since Plaintiffs have still failed to sufficiently plead any underlying cause of action, they are not entitled to these equitable remedies. Count Six simply requests that Plaintiffs' [*11] claims regarding the creation and legality of the MERS system be joined in the multi-district litigation pending before Judge Teilborg. Reassignment of a claim to multi-district litigation is not a legal cause of action and certainly does not constitute a claim against Sierra Pacific.

Finally, Count Ten is a preemptive challenge to the constitutionality of *A.R.S. § 33-811(B)*. Plaintiffs assert that if their residence is sold at a trustee's sale and the purchaser is issued a trustee's deed, then the purchaser may, in any future action that Plaintiffs might bring to invalidate the trustee's sale, rely on a conclusive presumption of compliance with the requirements for a trustee's sale under *A.R.S. § 33-811(B)*. Plaintiffs allege that this conclusive presumption would be unconstitutional as applied to any trustee sale of their property because, based on their other allegations regarding the illegitimacy of the MERS system and the allegedly improper assignment of their deed of trust, any trustee's sale of their property is unauthorized. Such a claim is not yet ripe since no trustee's sale of the property has occurred. Further, Plaintiffs offer no authority to support their contentions regarding [*12] MERS, which provides the foun-

ation for their purported constitutional claim. Finally, such a claim is not properly directed at Sierra Pacific, which does not have any interest in the deed of trust and accordingly can have no part in a non-judicial foreclosure of the property.

There is also no merit to the argument, made in Plaintiffs's response, that Sierra Pacific's motion to dismiss must be treated as a motion for summary judgment because it relies on documents outside the pleadings. Sierra Pacific's motion to dismiss is well-founded and based on arguments stemming solely from the face of Plaintiffs' amended complaint. The only attachments to Sierra Pacific's motion to dismiss are letters from Sierra Pacific's counsel to Plaintiffs' counsel regarding Sierra Pacific's attempts to be voluntarily dismissed from this action. This correspondence does not reflect on the merits of the motion to dismiss and instead goes to the propriety of an award of attorney's fees. Further, the documents which Plaintiffs attached to their response as support for their assertion that Sierra Pacific's motion to dismiss should be treated as a motion for summary judgment, including the deed of trust, notice [*13] of trustee's sale, assignment of deed of trust, and substitution of trustee, are documents upon which their own amended complaint relies, and would accordingly be properly considered on a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss. Plaintiffs are thus not entitled to any discovery or other relief under *Fed. R. Civ. P. 56(f)*, which is only applies to motions for summary judgment.

Because none of the causes of actions pled against Sierra Pacific states a claim for which relief can be granted, Sierra Pacific's Motion to Dismiss First Amended Complaint (Doc. 28) will be granted with prejudice.

IV. Freddie Mac, MERS, and CitiMortgage's Motion to Dismiss

Counts One, Two, Three, Six and Ten also fail to state any claim for relief against Freddie Mac, MERS, and CitiMortgage for the same reasons, as discussed above, that they fail to state a claim against Sierra Pacific. The remaining counts against Freddie Mac, MERS, and CitiMortgage also fail to state any plausible claims for relief.

While Plaintiffs' complaint is often unclear, verbose, confusing, and fails to comply with the requirements of *Fed. R. Civ. P. 8(a)*, most of Plaintiffs' allegations seem to be premised on variations of the "show [*14] me the note" theory and allegations about the assignment of the note and deed of trust. Count Four asserts claims of breach of contract and lack of authority to act as an agent on the grounds that Freddie Mac, MERS, and CitiMortgage were not properly assigned any interest in Plaintiffs' deed of trust or promissory note and thus had no authori-

ty to appoint Michael Bosco, Jr. as an agent and successor trustee to non-judicially foreclose on the deed of trust. In Count Eight--"Absence of Agency/Lack of Authority to Non-Judicially Foreclose Plaintiffs' Deed of Trust"--Plaintiffs again assert that, because Defendants have not presented evidence of the chain of title to the note and deed of trust, no Defendant has authority to conduct a trustee's sale of the property. In Count Nine, Plaintiffs claim that because the promissory note and deed of trust were separated, Defendants are barred from conducting a trustee's sale of the property. Plaintiffs have offered the Court no relevant, controlling authority to support any of these claims. Rather, non-judicial trustee's sales are controlled by the rules enumerated in *A.R.S. § 33-801 -- § 33-821*, and do not require production of the note and deed [*15] of trust or that the note and deed of trust remain together. See *Kane v. Bosco, No. CV10-1787-PHX-JAT, 2010 U.S. Dist. LEXIS 128746, 2010 WL 4879177 (D. Ariz. Nov. 23, 2010)*. This Court previously dismissed Plaintiffs' claims similarly premised on the "show me the note" theory (Doc. 17), just as the District of Arizona has generally rejected the "show me the note" theory and related arguments. See, e.g., *Diessner v. Mortgage Elec. Registration Sys., 618 F. Supp. 2d 1184 (D. Ariz. 2009)*; *Mansour v. Cal-Western Reconveyance Corp., 618 F. Supp. 2d 1178 (D. Ariz. 2009)*. Accordingly, Counts Four, Eight, and Nine will be dismissed for failure to state any claim for relief.

Count Five, which is pled against CitiMortgage only, alleges that the notice of substitution of trustee was improper under *A.R.S. § 33-804(D)*. Under *A.R.S. § 33-804*, a beneficiary may appoint a successor trustee at any time, and a notice of substitution of trustee "shall be sufficient if acknowledged by all beneficiaries under the trust deed or their agents" Plaintiffs claim that MERS is listed as a beneficiary under the deed of trust, but that it did not sign the notice of substitution of trustee and that therefore the notice of substitution [*16] of trustee was invalid. Accordingly, Plaintiffs claim CitiMortgage's agent, Michael Bosco, Jr., did not have authority to record the notice of trustee's sale. However, Plaintiffs' contention here hinges on its unsupported challenge to the legitimacy and authority of the MERS system and its speculative assertion that MERS did not have authority to assign the deed of trust to CitiMortgage, arguments which have repeatedly been rejected by district courts in the District of Arizona. See, e.g., *Kane, 2010 U.S. Dist. LEXIS 128746, 2010 WL 4879177, at *12 (citing Cervantes v. Countrywide Home Loans, Inc., No. CV09-517-PHX-JAT, 2009 U.S. Dist. LEXIS 87997, 2009 WL 3157160 (D. Ariz. Sept. 24, 2009))*. Plaintiffs have not provided any factual support for its contention that MERS was not authorized to transfer its beneficial interest in the deed of trust to CitiMortgage. As the beneficiary of the deed of trust, a CitiMortgage agent did sign

the notice of substitution of trustee as required under *A.R.S. § 33-804(D)*. Count Five therefore fails to state a claim for relief and will be dismissed.

Count Seven, entitled "Fraud," is alleged against MERS only. Plaintiffs here claim that 1) Sierra Pacific never transferred its interest in the promissory note to [*17] MERS, Freddie Mac, or CitiMortgage as required under the U.C.C.; and 2) the assignment of deed of trust, signed by Kim Krakoviak as a vice president of MERS, was fraudulent because Ms. Krakoviak did not have authority to sign the assignment of deed of trust. The Court has already dismissed claims based on the premise that the U.C.C. controls non-judicial foreclosure sales (Doc. 17), an assertion which is unfounded and for which Plaintiffs provide no support. With respect to the fraud claim, to prevail on a cause of action for fraud in Arizona, nine elements must be shown: "1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or ignorance of its truth; 5) the speaker's intent that it be acted upon by the person and in a manner reasonably contemplated; 6) the hearer's ignorance of its falsity; 7) his reliance on its truth; 8) his right to rely thereon; and 9) his consequent and proximate injury." *Wagner v. Casteel*, 136 Ariz. 29, 31, 663 P.2d 1020, 1022 (1983) (citation omitted). Here, Plaintiffs have merely put forward broad allegations and legal conclusions without any of the factual specificity that is required to plead a fraud claim. Such [*18] speculative assertions about lack of authority do not meet the particularity requirement for pleading fraud under the federal rules. Accordingly, Count Seven also fails to state a claim for relief.

Finally, Count Eleven pleads a breach of contract claim for Defendants' purportedly unauthorized securitization of Plaintiffs' home mortgage loan. Plaintiffs have cited no authority for their assertion that securitization has any impact on their obligations under the loan, and district courts in Arizona have rejected similar arguments. *See, e.g., Colonial Savs., FA v. Gulino*, No. CV09-1635-PHX-GMS, 2010 U.S. Dist. LEXIS 49755, 2010 WL 1996608 (D. Ariz. May 19, 2010). Count Eleven thus also fails to state a claim for relief.

V. Leave to Amend

Although leave to amend should be freely given "when justice so requires," *Fed. R. Civ. P. 15(a)(2)*, the district court has "especially broad" discretion to deny leave to amend where the plaintiff already has had one or more opportunities to amend a complaint. *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989). "Leave to amend need not be given if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). [*19] "Futility of amendment can, by itself, justify the

denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

Plaintiffs have already been given the opportunity to file an amended complaint to properly plead any causes of action they have against Defendants. Nonetheless, Plaintiffs' First Amended Complaint does not cure the deficiencies of their initial complaint and still fails to state any plausible claim for relief against any of the Defendants. With the benefit of the extended oral argument that was heard on the motions on April 21, 2001, the Court is satisfied that further amendment would be futile. Plaintiffs' broad attack on MERS has already been rejected by this Court, Plaintiffs acknowledged that they had no additional facts to plead to support a fraud claim if given leave to amend, and, as discussed above, even if the notice of the trustee's sale did not properly inform Plaintiffs of their right to challenge the sale, any such deficiency is harmless as Plaintiffs have retained counsel and had the opportunity to raise their claims in this Court before the trustee's sale has been conducted. For these reasons, further leave to amend will not [*20] be granted. *See McHenry*, 84 F.3d at 1177 (affirming dismissal with prejudice of prolix, argumentative, and redundant amended complaint that did not comply with *Rule 8(a)*); *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 673-74 (9th Cir. 1981) (affirming dismissal of amended complaint that was "equally as verbose, confusing, and conclusory as the initial complaint"); *Corcoran v. Yorty*, 347 F.2d 222, 223 (9th Cir. 1965) (affirming dismissal without leave to amend of second complaint that was "so verbose, confused and redundant that its true substance, if any, [was] well disguised").

III. Attorney's Fees

Sierra Pacific requests an award of attorney's fees and costs pursuant to *Fed. R. Civ. P. 11*. Freddie Mac, MERS, and CitiMortgage request attorney's fees and costs under the terms of the contract and *A.R.S. §§ 12-341, 12-341.01, and 12-349*. The Court does not now decide whether attorney's fees and costs should be granted. Rather, Defendants may pursue attorney's fees and costs as provided in *L.R.Civ. 54.2* after entry of judgment or under *Fed. R. Civ. P. 11(c)(2)*.

IT [*21] IS THEREFORE ORDERED that Defendant Sierra Pacific Mortgage Services, Inc. FN's Motion to Dismiss (Doc. 15) is denied as moot.

IT IS FURTHER ORDERED that Defendant Sierra Pacific Mortgage Services, Inc. FN's Motion to Dismiss First Amended Complaint (Doc. 28) is granted with prejudice.

IT IS FURTHER ORDERED that Defendants Federal Home Loan Mortgage Corporation, Mortgage Electronic Registration System, Inc., and Citi Mortgage,



**WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST
CHURCH, Plaintiff, v. UNITED STATES GYPSUM COMPANY, et al., Defendants**

Civil Action No. 85-1606

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1986 U.S. Dist. LEXIS 22246

July 25, 1986, Decided and Filed

OPINION BY: [*1] GREEN

OPINION

ORDER

JOYCE HENS GREEN, UNITED STATES DISTRICT JUDGE

This matter comes before the Court on the defendants' joint motion to dismiss. For the reasons set forth below the defendants' motion is granted in part and denied in part.

I.

Plaintiff Wesley Theological Seminary of The United Methodist Church ("Wesley") is a non-profit organization located in the District of Columbia. In May, 1985 Wesley filed this action against the United States Gypsum Company, the National Gypsum Company, and the W.R. Grace Company to recover "sums of money expended and to be expended on account of the presence of defendants' hazardous asbestos-containing acoustical plaster products in its buildings." Memorandum of Points and Authorities in Opposition to Defendants' Joint Motion to Dismiss at 1. Wesley claimed that it had already removed some of the asbestos material and would "eventually face the expensive prospect of removing all of defendants' asbestos products from its property." *Id.* The plaintiff's complaint requested compensatory and punitive damages based on numerous tort and contract causes of action. The legal theories proffered included strict liability, negligence, breach [*2] of express and implied warranties, fraud and misrepresentation, nuisance, and restitution. Additionally, the plaintiff alleged that the

defendants acted "intentionally, in concert and conspiratorily." *Id.* at 2.

Defendants United States Gypsum, National Gypsum, and W.R. Grace manufacture and sell asbestos products. The defendants apparently do not contest at this point in the proceedings the plaintiff's claim that its asbestos products were installed in the plaintiff's buildings. Rather, the defendants' motion to dismiss focuses on the legal sufficiency of the plaintiff's claims. The defendants argue that the plaintiff seeks recovery for economic loss, and that tort law does not permit recovery for economic loss. The defendants further contend that in the absence of a valid tort claim the "concert of action" and "civil conspiracy" counts must be dismissed. The defendants challenge the sufficiency of the breach of warranty claim by arguing that the plaintiff failed to give notice as required under District of Columbia law. Finally, the defendants contend that the plaintiff's allegations cannot, as a matter of law, satisfy the required elements of a proper restitution or nuisance [*3] claim.

II.

When reviewing a motion to dismiss a court may not dismiss the complaint "unless it appears that the plaintiff can prove no set of facts in support of . . . [the] claim which would entitle [the] plaintiff to relief." *Conley v. Gibson*, 355 U.S. 41 (1957). The plaintiff defending against a motion to dismiss need not prove the factual basis for the claim; to the contrary, the court must accept the factual allegations as true.

A. The Tort Claims

The defendants contend that the plaintiff's claim for damages is not recoverable under a tort theory because

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the plaintiff has not alleged specific harm to persons or property:

Plaintiff's complaint is premised solely upon the anticipated effects of the alleged deterioration of asbestos-containing products, and, as such, is a plain example of a contract or warranty cause of action. But plaintiff is not seeking recovery for damage to its property that has already occurred. Instead, plaintiff wishes to be compensated for potential harm that may occur due to the perceived failure of the products over time to live up to its expectations. A tort action simply cannot be used as a vehicle for recovery of such damages.

Defendants' [*4] Reply Memorandum at 8. District of Columbia law, the defendants insist, "requires an accident causing actual property damage or personal injury as a prerequisite to a valid cause of action in tort." *Id.* at 8-9. Here, it is argued, the plaintiff had merely "chosen to act on its perception" that a "speculative, inchoate injury" has occurred. Defendants' Memorandum in Support of Joint Motion to Dismiss at 16.

The defendants' pleadings distort the plaintiff's allegations and misstate applicable District of Columbia law. Both sides concede that the District of Columbia has adopted the doctrine of strict liability in tort, as set forth in *section 402A, Restatement of Torts (Second)*. See *Cottom v. McGuire Funeral Service, Inc.*, 262 A.2d 807 (D.C. App. 1970); *Berman v. Watergate West, Inc.*, 391 A.2d 1351, 1356-57 (D.C. App. 1978). Second 402A states in pertinent part that:

(1) One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, *or to his property*, if

(a) the seller is engaged in the business of selling such a [*5] product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(Emphasis added.) In this instance the plaintiff has alleged that the defendants' product is "unreasonably dangerous" and has caused damage to its property. The complaint states that the defendants "have caused a seri-

ous health hazard to be created within and upon the property and building[s] of the plaintiff" and that the health hazard created by the defendants "has interfered with the safe and uninhibited use and enjoyment of plaintiff's property and buildings by the plaintiff and the individuals who use the plaintiff's buildings." This "dangerous condition," the plaintiff asserts, has created an "urgent situation [requiring] . . . immediate action for the health and welfare of persons using those buildings." Complaint, paras. 24, 26. The complaint, read together with the [*6] plaintiff's opposition memorandum, reflects that the plaintiff has closed parts of its buildings allegedly to protect inhabitants from the risk of asbestos contamination. Plaintiff's Memorandum in Opposition to Motion to Dismiss at 4. In short, the plaintiff has alleged property damage to the extent that its buildings have been made uninhabitable by an "unreasonably dangerous" product.

Precisely the same type of alleged injury was found to constitute property damage under *section 402A* by the District of Columbia Court of Appeals in *Berman v. Watergate West, Inc.*, 391 A.2d 1351. In *Berman* the plaintiff contended that her apartment was defective. The "most serious defect . . . was the malfunctioning of an air conditioning unit. According to appellant's testimony, the air conditioner created such serious humidity in her bedroom that she had to keep the door to that room closed and sleep in her living room for two years, until the unit was repaired." *Berman*, 391 A.2d at 1353. The court concluded that the claim was actionable in tort, and that the jury was entitled to measure damages based on the injury suffered from being left with an uninhabitable bedroom for a period of [*7] two years:

. . . the record clearly demonstrates that appellant was unable to use her bedroom for some two years. The lease for appellant's apartment was in evidence. On this basis, the jury could have arrived at a perfectly proper measure of consequential damages. See 2 L. Frumer and M. Friedman, *Products Liability* § 16-01[2] and cases cited therein at n.6. See also *Dravillas v. Vega*, D.C.App., 294 A.2d 363 (1972); *McCrossin v. Hicks Chevrolet, Inc.*, D.C.App., 248 A.2d 917, 921 (1969).

Id. at 1360.

Of course, whether Wesley was justified in closing parts of its buildings--that is, whether the defendants' acoustical ceiling materials *actually are* unreasonably dangerous and pose a threat to the health of building inhabitants--is a matter for the fact finder to decide. At this stage in the proceedings, the court *must* accept the plaintiff's allegations as true. To the extent, therefore, that the plaintiff has alleged that an unreasonably dangerous product has contaminated its buildings, created a health risk, and necessitated closure and repairs, it cannot be

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concluded from a liberal construction of the complaint that the allegations of injury [*8] are only speculative. The plaintiff has effectively alleged that parts of its premises are temporarily uninhabitable. If true, there is little question but that under *Berman* the defendants' product has caused property damage.¹

1 Other jurisdictions have reached the same result under similar circumstances. The Third Circuit, for example, has held that the question of whether radioactive emissions from a nuclear accident can be said to cause property damage for purposes of a tort claim is a matter about which "plaintiffs should be permitted to develop . . . facts." *Commonwealth of Pennsylvania v. General Public Utilities Corp.*, 710 F.2d 117, 122-23 (3d Cir. 1983). See also *Philadelphia National Bank v. Dow Chemical Co.*, 605 F. Supp. 60 (E.D. Pa. 1985) (plaintiffs permitted to introduce evidence to jury to support tort claim that defendant's product caused property damage by "increasing risk" that *person* might be hurt by weakened infrastructure (e.g. fallen mortar or brick)). Likewise, a New York court has recently held that asbestos installation can support a tort claim for property damage:

"The complaint can be properly construed as alleging that plaintiffs' buildings have been contaminated by asbestos; that the contamination has physically altered plaintiffs' buildings so as to have made them harmful to health; that the extent and imminence of the threat is not known, but it was certain to become progressively worse had plaintiffs not incurred the repair and replacement costs they seek to recover herein; that to remove the threat plaintiffs have had to tear down and replace portions of their buildings; and that this cost of retrofitting their buildings so as to make them safe is the measure of plaintiffs' property damages."

City of New York v. Keene Corp., No. 44559/84 (slip op. at 7) (Sup. Ct. N.Y. Nov. 19, 1985).

As discussed in *Keene*, an important distinguishing factor between tort and contract causes of action is the extent to which "safety interests" or "expectation interests" are involved. Here, as in *Keene*, the plaintiff does *not* contend that the asbestos ceiling did not perform its function as contracted for, but rather that it posed a safety risk from the time of installation. As the Superior Court in *Keene* phrased it:

"Given the nature of the risk, must plaintiffs have waited until the asbestos had flaked and deteriorated to the point that it could no longer function as insulation before being entitled to relief, and then only in contract? . . . the focus here is clearly on the danger posed, and not the failure of the product to function as expected. That the danger has not yet manifested itself in personal injury is a mere fortuity that ought not to deprive plaintiffs of relief in tort."

[*9] Having concluded that the plaintiff has properly alleged injury to its property and not mere "economic loss," none of the tort claims--whether based on a theory of strict liability, negligence, or intentional tort²--is subject to dismissal as a matter of law at this point in the proceedings.

2 As noted above, *section 402A* provides for recovery of damages for injury to *property* caused by a defective product under a theory of strict liability. Neither party contests the fact, however, that property damages could *also* be recoverable at common law under either a negligence or intentional tort theory.

B. Breach of Warranty and Restitution³

3 In its memorandum in opposition to the motion to dismiss, the plaintiff indicates that it no longer intends to proceed with the nuisance claim. Similarly, the Court's holding in part IIA above moots the defendants' challenge to the plaintiff's conspiracy allegations. Thus the only two remaining issues concern the breach of warranty and restitution claims

The defendants contend that the plaintiff's breach of warranty claims must be dismissed for failure to give notice under *District of Columbia Code § 28:2-607(3)(a)*. [*10] They argue that the plaintiff cannot properly claim that it was not required to give notice, because this argument necessitates conceding the underlying warranty claim. See Defendants' Reply Memorandum at 19-20. Similarly, the defendants insist that the plaintiff ought not be permitted to rely on a theory of "constructive notice" to the defendants, *see id.* at 20-22, because the plaintiff is not a "lay consumer" but rather a "commercial purchaser." *See id.* quoting *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984).

Whether the defendants received sufficient "constructive notice" sufficient to relieve the plaintiff of its obligations under *D.C. Code § 28:2-607(3)(a)* is an issue that cannot be resolved at this point in the proceedings in the absence of discovery. When reviewing a motion to dismiss the court must accept the plaintiff's allegations as

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true. The plaintiff here has alleged that the defendants had constructive notice of the alleged defect before the breach occurred.

The plaintiff's "restitution claim" presents different problems. The defendants correctly assert that as a general matter restitution does not give rise to an independent cause of action. Restitution [*11] is merely a *type* of remedy that an injured plaintiff may request under certain circumstances. Under District of Columbia law, a plaintiff is required to choose between a damage remedy or restitution. A plaintiff may not seek full restitution (accompanied by rescission of the contract) *and* damages. See *Mariner Water Renaturalizer of Washington v. Aqua Purification Systems*, 665 F.2d 1066, 1069 (D.C. Cir. 1981). Read in its entirety, the majority of the claims listed in the complaint appear to seek relief in the form of

damages. Accordingly, the claim for relief through restitution shall be dismissed without prejudice to reinstatement should the plaintiff indicate in writing within 20 days of this Order that it wishes to elect a remedy other than damages.

III.

For the reasons set forth above, the defendants' joint motion to dismiss is denied with respect to the plaintiff's tort, conspiracy, and breach of warranty claims and granted as unopposed with respect to the nuisance claim. The claim for restitution is dismissed without prejudice subject to the conditions set forth above in part IIB.

SO ORDERED this 25th day of July, 1986.



**NATIONAL RAILROAD PASSENGER CORPORATION, Plaintiff, v. VEOLIA
TRANSPORTATION SERVICES, INC., and VEOLIA TRANSPORTATION, INC.,
Defendants.**

Civil Action No. 1:07-1263 (RBW)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2011 U.S. Dist. LEXIS 49215

May 9, 2011, Filed

PRIOR HISTORY: *AMTRAK v. Veolia Transp. Servs.*,
592 F. Supp. 2d 86, 2009 U.S. Dist. LEXIS 932 (D.D.C.,
2009)

COUNSEL: [*1] For NATIONAL RAILROAD PAS-
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For VEOLIA TRANSPORTATION SERVICES INC,
VEOLIA TRANSPORTATION INC, Defendants: Kim
Hoyt Sperduto, LEAD ATTORNEY, THE SPERDUTO
LAW FIRM, PLC, Washington, DC.

JUDGES: REGGIE B. WALTON, United States Dis-
trict Judge.

OPINION BY: REGGIE B. WALTON

OPINION

MEMORANDUM OPINION

The plaintiff, National Railroad Passenger Corpora-
tion ("Amtrak"), filed this action on July 16, 2007,
against Veolia Transportation Services, Inc. and Veolia
Transportation, Inc. (collectively "Veolia"), asserting, in
Count I, that Veolia aided and abetted the breach by sev-
eral former Amtrak employees of the fiduciary duties
they owed to Amtrak and, in Count II, that Veolia tor-
tiously interfered with Amtrak's prospective economic
advantage with regard to a public transportation opera-
tion in Southern Florida. See generally Complaint
("Compl."). Currently before the Court is the plaintiff's

motion for partial summary judgment on Count I of its
Complaint and the defendants' cross-motion for summary
judgment on both Counts I and II of the Complaint. Up-
on consideration of the parties' submissions and [*2] for
the reasons set forth below, ¹ both parties' motions for
summary judgment must be denied.

1 In resolving these motions, the Court also con-
sidered: the Memorandum of Law in Support of
Plaintiff's Motion for Summary Judgment as to
Liability on Count I ("Pl.'s Mem."); the Plaintiff's
Statement of Material Facts Not in Dispute ("Pl.'s
Facts"); the Defendants' Memorandum of Points
and Authorities in Opposition to Amtrak's Motion
for Partial Summary Judgment ("Def.'s' Opp'n");
the Defendants' Local Rule 7(h) Counterstate-
ment of Facts in Opposition to Plaintiff's Motion
for Partial Summary Judgment ("Def.'s' Counter
Facts"); Plaintiff National Railroad Passenger
Corporation's Reply Brief in Further Support of
Its Motion for Partial Summary Judgment ("Pl.'s
Reply"); the Memorandum of Points and Authori-
ties in Support of Defendants' Motion for Sum-
mary Judgment ("Def.'s' Mem."); the Defendants'
Local Rule 7(h) Statement of Material Facts as to
Which There Is No Genuine Issue to be Litigated
in Support of Defendants' Motion for Summary
Judgment ("Def.'s' Facts"); Plaintiff National
Railroad Passenger Corporation's Memorandum
of Law in Opposition to Defendants' Motion for
Summary Judgment ("Pl.'s [*3] Opp'n"); the
Plaintiff's Responses to Statements of Material
Facts by Defendants Veolia Transportation Ser-
vices, Inc. and Veolia Transportation, Inc. and
Plaintiff's Supplemental Statements of Facts Pre-

cluding Summary Judgment ("Pl.'s Supp. Facts"); the Defendants' Reply Memorandum of Points and Authorities in Further Support of Their Motion for Summary Judgment ("Defs.' Reply"); and the Defendants' Local Rule 7(h) Reply Statement of Material Facts in Further Support of Defendants' Motion for Summary Judgment ("Defs.' Reply Facts"). The Court also considered the declarations and affidavits submitted by the parties in conjunction with their motions and oppositions, which will be identified throughout this opinion.

I. Background

The factual background giving rise to the allegations in the plaintiff's Complaint was set forth in this Court's earlier opinion denying the defendants' motion to dismiss. See *Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp. 2d 86 (D.D.C. 2009) (Walton, J.) ("Amtrak I"). While that background was drawn solely from the allegations made in the plaintiff's Complaint, the following is based upon facts that are either undisputed or are matters [*4] of public record, except where otherwise noted.

Veolia and Amtrak are both "providers of transportation services, including operations services for commuter rail systems." Compl. ¶ 6. Both have "the infrastructure, personnel, and institutional experience necessary to operate major urban commuter rail services." Plaintiff's Statement of Material Facts Not in Dispute ("Pl.'s Facts") ¶ 6; Defendants' Local Rule 7(h) Counterstatement of Facts in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Defs.' Counter Facts") § I ¶ 6.

The controversy in this case arises from the two companies' participation in a competitive bidding process for a contract to provide commuter rail operation service for the South Florida Regional Transportation Authority (the "SFRTA") for "seven years with one three-year option period." Compl. ¶ 11; Plaintiff's Motion for Partial Summary Judgment on Count I ("Pl.'s Mot."), Declaration of Gary A. Orseck ("Orseck Decl."), Exhibit ("Ex.") 8 (RFP No. 06-112) at AMTH 003757-3761.² Amtrak alleges that Veolia aided and abetted three former Amtrak employees in breaching their fiduciary duties to Amtrak in connection with Veolia's efforts to acquire the SFRTA [*5] contract. Compl. ¶¶ 53-59. Amtrak also contends that Veolia interfered with its prospective economic advantage by soliciting the employment of those former Amtrak employees and causing two of them to refuse to be listed as part of Amtrak's management team in its bid to acquire the SFRTA contract. Id. ¶¶ 60-66.

² Part of the administrative record in this case was submitted to the Court as attachments to the

parties' various filings. When citing to the administrative record, the Court will first indicate the particular filing with which the administrative record was submitted, followed by the document's administrative record Bates numbers.

A. The Request for Proposals

The SFRTA is a public transit agency that receives public funds and operates the commuter rail service known as the Tri-Rail in Miami-Dade, Broward, and Palm Beach counties in South Florida. Defendants' Local Rule 7(h) Statement of Material Facts as to Which There Is No Genuine Issue to be Litigated in Support of Defendants' Motion for Summary Judgment ("Defs.' Facts") ¶ 1; Plaintiff's Responses to Statements of Material Facts by Defendants Veolia Transportation Services, Inc. and Veolia Transportation, Inc. and Plaintiff's [*6] Supplemental Statements of Facts Precluding Summary Judgment ("Pl.'s Supp. Facts") § I ¶ 1. In the latter part of 2006, the SFRTA issued a request for bid proposals ("RFP" or "Request for Proposals"), inviting service providers to submit bids to operate and maintain the Tri-Rail commuter system. Defs.' Facts ¶ 4; Pl.'s Supp. Facts § I ¶ 4. Eight companies purchased the SFRTA's Operations Request for Proposal information, Defs.' Counter Facts § I ¶ 19, and representatives from four of those companies, Herzog Transit Services, Inc. ("Herzog"), Veolia, Amtrak, and the Washington Group International attended a Tri-Rail pre-proposal conference on October 18, 2006, id.; Pl.'s Facts ¶ 19. Proposals for the Tri-Rail contract were due on or before January 11, 2007. Compl. ¶ 12. According to the RFP, the requirements needed for a successful bid included, inter alia, the composition of a "Key Management Team" that would be responsible for operating and managing the Tri-Rail system. Id. ¶ 13. Specifically, "[t]he Operations [Request for Proposals] required that each bidder propose a general manager and an on-site Key Management Team[] comprised of members responsible for the following functions: [*7] Transportation, Safety, Human Resources/Labor Relations, and Communications (Operations Center)." Defs.' Facts ¶ 23; Pl.'s Supp. Facts § I ¶ 23. "The Operations [Request for Proposals] set forth strict requirements concerning the qualifications of the Key Management Team [M]embers," which required each team member to "possess a minimum of [three] years of recent experience . . . as the operator of a passenger railroad service." Compl. ¶ 14 (internal quotation marks omitted). Further, it required that the Key Management Team as a whole "demonstrate relevant experience with the key railroad functions," including "[t]rain operations in a multiple user environment[;] . . . [c]rew management; . . . [c]ustomer service[;] . . . [r]ailroad employee training and certification; [r]ail operations interface management with maintenance and new construction; [f]inancial man-

agement and reporting of rail operations[;] . . . [and r]ailroad safety program management." Id. Amtrak and Veolia were the only two companies that submitted proposals. Defs.' Facts ¶ 200; Pl.'s Supp. Facts § I ¶ 200.

B. Veolia's Proposed Key Management Team On Its Tri-Rail Bid

Veolia began recruiting for its Tri-Rail general manager [*8] position in early 2006. Defs.' Facts ¶ 36. Recruiting a general manager was "[o]ne of Veolia's first priorities in pursuing the Tri-Rail" contract because the person selected could then "help manage the proposal effort and . . . manage the contract if it was awarded to Veolia." Id. ¶ 35. Among the candidates Veolia considered for the position was Joseph Yannuzzi, an Amtrak employee. Id. ¶ 38. Several months before the proposal due date, Veolia contacted Mr. Yannuzzi about potentially working for Veolia, but Veolia and Amtrak dispute whether Mr. Yannuzzi was aware that Veolia's potential offer would be contingent on the success of its bid for the Tri-Rail Operations contract. Id. ¶¶ 90-92; Pl.'s Supp. Facts § I ¶¶ 90-92. ³ Following Veolia's "entreaty," ⁴ Mr. Yannuzzi informed Gilbert Mallery, Amtrak's Vice President of Strategic Planning and Contract Administration, regarding the contact he had with Veolia. Defs.' Facts ¶ 92.

³ Several similar encounters occurred between Veolia and other Amtrak employees. Id. ¶¶ 94-98; Pl.'s Supp. Facts § I ¶¶ 94-98. Despite these alleged encounters, Amtrak and Veolia disagree on whether Amtrak knew about Veolia contacting its employees concerning contingent [*9] offers of employment. Pl.'s Supp. Facts § I ¶¶ 94-98.

⁴ The recruitment of Mr. Yannuzzi was discontinued when he informed Veolia that he would be unwilling to leave Amtrak unless Veolia was able to match his retirement and health benefits. Defs.' Facts ¶ 91.

Ultimately, on June 15, 2006, Veolia hired Sidney Birckett for the position of general manager, id. ¶ 41, who had been an at-will employee with Amtrak, id. ¶ 37. His selection for the position with Veolia was not contingent upon it securing the Tri-Rail Operations contract. Id. ¶¶ 37, 41; Pl.'s Facts ¶ 31. ⁵ As general manager, Mr. Birckett worked with Neil Shah, Veolia's Manager of Rail Development, John Kerins, Veolia's Vice President for Rail Development, and Veolia's Human Resources Department to identify and recruit candidates for the other members of Veolia's Key Management Team. Defs.' Facts ¶¶ 42, 44; Pl.'s Supp. Facts § I ¶ 42.

⁵ The Court recognizes that there is a dispute concerning whether Veolia ever extended Mr.

Birckett a contingent offer of employment if Veolia was awarded the Tri-Rail Operations contract, or rather, merely discussed the possibility of a contingent offer with him. Pl.'s Facts ¶¶ 29-31; Defs.' Counter [*10] Facts § I ¶¶ 29-31.

For its Transportation position, Veolia considered James Turngren and Victor Salemme, both Amtrak employees, ⁶ as well as Marcus Moore, an independent consultant, and Deborah Wetter, a Veolia employee. Defs.' Facts ¶ 45; Pl.'s Supp. Facts § I ¶ 45. ⁷ Veolia ultimately extended a contingent offer of employment to Mr. Salemme, who accepted the offer on November 3, 2006. Defs.' Facts ¶¶ 45, 56; Pl.'s Supp. Facts § I ¶ 45, 56. Although, the offer was contingent upon Veolia being awarded the Tri-Rail Operations Contract, Mr. Salemme permitted Veolia to list him and his résumé on its bid. Defs.' Facts ¶ 56. At the time of the offer, Mr. Salemme was the Assistant Superintendent for Amtrak's Maine Passenger Service, and he had previously been recognized by Amtrak for his exceptional service. Id. ¶¶ 49, 52; Pl.'s Supp. Facts § I ¶¶ 49, 52.

⁶ The Court notes that it is unclear from the record whether Veolia contacted Mr. Turngren for purposes of recruitment. However, the record is clear that Veolia initiated the recruitment of Mr. Salemme. Pl.'s Mot., Orseck Decl., Ex. 32 (May 8, 2008 Deposition Transcript of Victor Salemme) ("Salemme Dep.") at 44:10-18.

⁷ The Court notes that [*11] there is a dispute whether Ms. Wetter was actually considered by Veolia for its Transportation position. Pl.'s Supp. Facts § I ¶ 45.

For its Safety position, Veolia considered Amtrak employees Doug Stencil and Jewel Picket, ⁸ along with James Waterman, a Veolia employee. Defs.' Facts ¶ 59. Veolia interviewed Mr. Stencil, a Senior Analyst in the Operation Practices Section, id. ¶¶ 60, 63; Pl.'s Mot., Orseck Decl., Ex. 33 (May 7, 2008 Deposition Transcript of Douglas Stencil) ("Stencil Dep.") at 44:11-19, who had an exceptional record as an Amtrak employee, see Defs.' Facts ¶ 65 (noting that he had "never been disciplined or reprimanded"). On October 31, 2006, Veolia extended Mr. Stencil an offer of employment contingent on it being awarded the Tri-Rail Operations contract, which Mr. Stencil accepted on November 3rd of the same year. Id. ¶ 68. Veolia's offer to Mr. Stencil was identical in nature to the offer accepted by Mr. Salemme. Id. ¶¶ 56, 68.

⁸ The Court notes that it is unclear from the record whether Veolia initiated the recruitment of Ms. Picket, however, the Record seems to suggest that Veolia initiated the recruitment of Mr.

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Stencil, Pl.'s Mot., Orseck Decl., Ex. 33 (May 7, 2008 [*12] Deposition Transcript of Douglas Stencil) ("Stencil Dep.") at 70:1-22, 71:1-3.

For its Communications position, Veolia considered Amtrak employee Gary Mauck,⁹ James Tylick of Veolia,¹⁰ and Mr. Moore, who also had been considered for the Transportation position. Id. ¶ 71. Veolia first heard of Mr. Mauck's potential availability from Tom Kirk, an Amtrak Assistant Superintendent in Florida, who said that Mr. Mauck was planning to retire from his position with Amtrak. Defs.' Facts ¶ 76; Pl.'s Supp. Facts § I ¶ 76. Mr. Moore had been Veolia's first choice for the position; however, after learning that Mr. Moore would be unavailable for the initial proposal deadline, Defs.' Facts ¶ 72, Veolia "called Mr. Mauck and asked him if he would be interested in the potential Communications Manager position with Veolia for the Tri-Rail Operations [C]ontract," id. ¶ 77. Mr. Mauck submitted his résumé to Veolia for the position on November 8, 2006, id. ¶ 78, and within a few days he was extended a contingent offer similar to the terms offered to Mr. Salemme and Mr. Stencil, which he accepted, id. ¶ 83. At that time, Mr. Mauck was the District Manager for Amtrak in New Mexico and had an exceptional [*13] employment record. Id. ¶¶ 73, 81.

9 The Court notes that the record is clear that Veolia initiated the recruitment of Mr. Mauck. Pl.'s Mot., Orseck Decl., Ex. 31 (May 8, 2008 Deposition Transcript of Gary Mauck) ("Mauck Dep.") at 32:4-11.

10 Mr. Tylick was offered the position but he declined the offer. Pl.'s Supp. Facts § I ¶ 71; Defs.' Reply Facts § I ¶ 71.

Finally, Veolia filled the Human Resources and Labor Relations position with a contractor employed by CSX Transportation, Inc.,¹¹ proposing the identical contingent offer that was made to the other potential members on the Key Management Team. Id. ¶¶ 87-89.

11 CSX, like Amtrak and Veolia, Inc., is a provider of transportation services, including operations services and commuter rail systems. See Defs.' Facts ¶ 4. At the time the Requests for Proposals for the Tri-Rail Contract were issued in 2006, the SFRTA's "dispatching and maintenance of way services [were] being provided by CSX," whose contract was soon scheduled to expire. Id.

Veolia submitted its proposal to the SFRTA on January 11, 2007, with a price proposal of \$97,155,817. Id. ¶¶ 155-56.

C. Amtrak's Tri-Rail Proposal

On November 2, 2006, Amtrak posted openings on its public website [*14] for its Key Management Team positions for the Tri-Rail contract, and stated that it would accept applications for the positions from both external and internal candidates. Id. ¶¶ 110, 112; Pl.'s Supp. Facts § I ¶¶ 110, 112. Ultimately, Amtrak selected three individuals for its Key Management Team from existing Amtrak employees, Defs.' Facts ¶¶ 113, 159 (Joe Yannuzzi as General Manager, Lou Pescevic as Assistant Superintendent of Transportation, and Doug Stencil as Principal, Safety/Training), along with Guy Whitney, a Herzog employee to whom Amtrak extended a contingent offer as its choice for the Communications position. Id. ¶¶ 113, 133, 134; Pl.'s Supp. Facts § I ¶¶ 113, 133, 134. Angel Torress, who did not possess the level of railway experience required by the Operations Request for Proposals,¹² nonetheless was selected by Amtrak for the Human Resources and Labor Relations position. Defendants' Local Rule 7(h) Reply Statement of Material Facts in Further Support of Defendants' Motion for Summary Judgment ("Defs.' Reply Facts") § III ¶¶ 41-44. Amtrak identified Mr. Stencil as the person who would occupy the Safety position, Defs.' Facts ¶¶ 125-26; Pl.'s Supp. Facts § I ¶¶ 125-26, [*15] and he signed the Key Employee Certification submitted with Amtrak's December 21, 2006 bid, but the parties dispute whether Mr. Stencil and Amtrak ever agreed to do more than merely permit his name and résumé to be submitted with the bid, Defs.' Facts ¶¶ 129, 130; Pl.'s Supp. Facts § I ¶ 129. Finally, Amtrak asked Mr. Salemme about his interest in the Transportation position, but Mr. Salemme refused to be considered for that position, Pl.'s Facts ¶ 57; however, the parties disagree on whether he rejected Amtrak's overtures because he "was involved with [Veolia] already," id., or for other reasons, Defs.' Facts ¶ 119. Ultimately, Amtrak selected Lou Pescevic for the Transportation position. Pl.'s Supp. Facts § I ¶¶ 118, 121.¹³

12 The Operations Request for Proposals established that the "General Manager and each member of the Contractor's Key Management Team must possess a minimum of 3 years of recent experience (i.e.,] within the past 5 years) as the operator of a passenger railroad service." Pl.'s Mot., Orseck Decl., Ex. 8 (RFP) § 3.1 at AMTH 003718.

13 The complete title of this position was "Assistant Superintendent, Transportation for the Operations [C]ontract." Pl.'s Supp. Facts [*16] § I ¶ 121.

Amtrak also assembled a team to prepare its proposal for the Tri-Rail contract. Defs.' Facts ¶ 157. In preparing Amtrak's bid, the team considered various factors affecting price, including statutory requirements, labor costs, overhead rates, potential liabilities, and manage-

ment fees. Id. ¶¶ 161-192. Amtrak had particular "concern[s] that [its] total cost package was already higher than [its] competitors and that increasing the management fee would only further increase Amtrak's costs." Id. ¶ 189; Pl.'s Supp. Facts § I ¶ 189. Despite these concerns, Amtrak's team received final approval for its proposal from senior Amtrak management officials sometime between late December 2006 and early January 2007. Defs.' Facts ¶¶ 193, 195; Pl.'s Supp. Facts § I ¶¶ 193, 195. Consequently, Amtrak submitted its proposal to the SFRTA on January 4, 2007, with a price proposal of \$162,639,724. Defs.' Facts ¶¶ 197, 198; Pl.'s Supp. Facts § I ¶¶ 197, 198.

D. The SFRTA Awards the Contract to Veolia

Upon receiving the two bids for the Tri-Rail contract, a SFRTA evaluation committee assigned numerical scores to each bid in four categories for purposes of determining which bid to select. Compl. ¶¶ [*17] 43-47; Pl.'s Mot., Orseck Decl., Ex. 13 (Evaluation Memo). Those four categories and the scores assigned to each category were the following: the price of the bid (which accounted for 15 points of the final score), the technical approach of the bid (worth 25 points of the final score), the operating plans (worth 25 points of the final score), and the qualifications and experience of the Key Management Team (worth 35 points of the final score). See Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment ("Defs.' Mem."), Declaration of T. Stewart Rauch ("Rauch Decl."), Ex. 1 (Operations RFP) at AMTH004101-02, AMTH004169-70. In reviewing the bids, the SFRTA retained the right to reject both proposals if, for example, neither proposal was sufficiently responsive to the SFRTA's requirements. See Pl.'s Mot., Orseck Decl., Ex. 15 (May 27, 2008 Deposition Transcript of Bonnie Arnold) ("Arnold Dep.") at 26:2-30:25. Excluding the score awarded to the price component, Veolia's bid received a total score of 70 points, while Amtrak's bid received a score of 62.3 points. Defs.' Mem., Rauch Decl., Ex. 62 (SFRTA Evaluation Committee Rankings) at AMTH002916. As to [*18] the price component of its equation, the SFRTA adopted a policy of not awarding any points to bids that were priced more than 15 points higher than the lowest price proposal, id., Rauch Decl., Ex. 1 (Operations RFP) at AMTH004170, and because Veolia had underbid Amtrak by 66%, the SFRTA awarded Veolia 15 points, while Amtrak received a score of zero, ¹⁴ id., Rauch Decl., Ex. 62 (SFRTA Evaluation Committee Rankings) at AMTH002916. Amtrak's and Veolia's scores were nearly identical in the qualifications and experience category, with Veolia receiving 28.0 points and Amtrak receiving 27.3 points for the composition of their respective Key Management Teams. Id.; id., Affidavit of Joseph Giuliatti ("Giuliatti Aff.") ¶ 7. The

scores in this category were based on the individual reviewers' assessments of each Key Management Team based on criteria identified in the SFRTA's Request for Proposals. See id., Rauch Decl., Ex. 1 (Operations RFP) at AMTH004169-70. ¹⁵ Accordingly, the SFRTA's Evaluation Committee awarded Veolia's proposal a total score of 85 points, and Amtrak's proposal received a total score of 62.3. Defs.' Facts ¶ 212; Pl.'s Supp. Facts ¶ 212. As a result of this large disparity, [*19] the SFRTA selection committee voted unanimously to award Veolia the Operations contract. Defs.' Mem., Rauch Decl., Ex. 61 (SFRTA Recommendation Memo) at 2; see id., Giuliatti Aff. ¶ 7.

14 As noted above, Amtrak's final bid price was \$162,639,724, Defs.' Mem., Rauch Decl., Ex. 15 (Amtrak Proposal) at AMTH000422, while Veolia's final bid price was \$97,155,817, id., Rauch Decl., Ex. 10 (Veolia SFRTA Proposal) at AMTH006557. See also Defs.' Facts ¶ 202.

15 The evaluation criteria for this category were corporate skills and experience, financial resources, experience of the proposed general manager and Key Management Team members, safety record, references from past and current projects, and understanding of commuter rail operating environments. Defs.' Mem., Rauch Decl., Ex. 1 (Operations RFP) at AMTH004169.

On January 24, 2007, Amtrak was notified by the SFRTA that it had not been awarded the Tri-Rail contract. Id., Rauch Decl., Ex. 68 (Notice of Intent to Award for RFP 06-112). As a result of not being selected, Amtrak filed a notice of intent to file a bid protest and requested copies of Veolia's proposal, Defs.' Mem., Rauch Decl., Ex. 71 (January 25, 2007 Letter from Thomas Moritz of Amtrak [*20] to Christopher C. Bross of SFRTA), which it received on January 26, 2007, Compl. ¶ 52. Receipt of Veolia's proposal provided Amtrak access to information not only about Veolia's price proposal, but also about the fact that Mauck, Salemme, and Stencil had appeared on Veolia's bid as members of its proposed Key Management Team. Id. ¶¶ 51-52.

On February 8 and 9, 2007, Amtrak informed Salemme and Mauck that they had violated its conflict-of-interest policy by permitting their names to be associated with Veolia's bid, and that they had to resign from their positions with Amtrak or they would be involuntarily terminated. ¹⁶ Pl.'s Facts ¶¶ 95, 99; Defs.' Facts ¶¶ 228, 233. Both opted to resign. Defs.' Facts ¶¶ 228, 233; Pl.'s Mot., Orseck Decl., Ex. 32 (May 8, 2008 Deposition Transcript of Victor Salemme) ("Salemme Dep.") at 36:18-43:14; id., Orseck Decl., Ex. 31 (May 8, 2008 Deposition Transcript of Gary Mauck) ("Mauck Dep.")

at 85:4-14. In addition, Amtrak terminated Mr. Stencil's employment based on its conflict-of-interest policy. Defs.' Facts ¶¶ 231-32.

16 According to Amtrak, its employees are required to "agree to Amtrak's Conflict of Interest Policy," which "prohibits employees from [*21] having relationships with competitors of Amtrak that result in compensation or other value received, and requires the disclosure of any relationships/positions that may be potential or actual conflicts of interest." Pl.'s Facts ¶ 95.

On February 12, 2007, Salemme, Stencil, and Mauck received permanent offers from Veolia. See Defs.' Mem., Rauch Decl., Ex. 75 (Offer letter from John Kerins to Mr. Salemme); id., Rauch Decl., Ex. 76 (Offer letter from Mr. Kerins to Mr. Stencil); id., Affidavit of Gary F. Mauck ("Mauck Aff."), Ex. C (Offer letter from Mr. Kerins to Mr. Mauck). All three commenced their employment with Veolia shortly thereafter and are currently employed by Veolia on the SFRTA Tri-Rail project. See Pl.'s Mot., Orseck Decl., Ex. 31 (Mauck Dep.) at 21:14-22:17; id., Orseck Decl., Ex. 32 (Salemme Dep.) at 43:15-44:9; id., Orseck Decl., Ex. 33 (Stencil Dep.) at 9:11-22.

Salemme, Stencil, and Mauck had been at-will Amtrak employees, Defs.' Facts ¶¶ 50, 64, 79; Pl.'s Supp. Facts § I ¶¶ 50, 64, 79, and none of them had signed documents barring them from competing with Amtrak after their employment with Amtrak terminated, Defs.' Facts ¶¶ 50, 64, 80; Pl.'s Supp. Facts § I ¶¶ 50, 64, [*22] 80. The parties disagree on whether any of the three Amtrak employees knew that Amtrak was seeking to acquire the Tri-Rail contract before signing contingent offers with Veolia. Defs.' Facts ¶¶ 54, 70, 85; Pl.'s Supp. Facts § I ¶¶ 54, 70, 85. It is also disputed whether Veolia asked the employees "not to sign up with Amtrak" on its bid to acquire the Tri-Rail contract. Defs.' Facts ¶¶ 57, 69, 84; Pl.'s Supp. Facts § I ¶¶ 57, 69, 84.

E. The Current Litigation

In this action, Amtrak seeks to recover damages it has allegedly suffered as a result of not being awarded the SFRTA contract. Compl. at 1-2. As noted earlier, Amtrak asserts two claims against Veolia. The first count of the Complaint alleges that Veolia aided and abetted the three former Amtrak employees' breach of their fiduciary duties owed to Amtrak, resulting in Amtrak not being awarded the SFRTA contract. Id. ¶¶ 53-59. The second count of the Complaint alleges that Veolia tortiously interfered with Amtrak's prospective business expectancy associated with the Tri-Rail contract. Id. ¶¶ 60-66.

Pursuant to *Federal Rule of Civil Procedure 56*, Amtrak has moved for partial summary judgment on the first count of its Complaint. Pl.'s [*23] Mot. at 1. Amtrak contends as support for its motion that (1) its three former employees each owed a fiduciary duty to Amtrak, Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment as to Liability on Count I ("Pl.'s Mem.") at 15-17, and (2) Veolia helped the employees breach those duties by extending contingent offers to them, id. at 23-24, including their names and résumés on its bid for the Tri-Rail contract, and inducing them to exclude their names from Amtrak's bid, id. at 24.

Veolia opposes the motion on the ground that genuine issues of material fact exist as to the claim asserted in Count I. Defendant's Memorandum of Points and Authorities in Opposition to Amtrak's Motion for Partial Summary Judgment ("Defs.' Opp'n") at 1. In addition, Veolia has filed a cross-motion for summary judgment on both counts of the Complaint, asserting, as to Count I, that there is no genuine issue of material fact as to the following: (1) that Amtrak's former employees did not breach any fiduciary duties owed to Amtrak because the SFRTA contract was outside the scope of their employment, Defs.' Mem. at 13; Defs.' Opp'n at 9-10; (2) that signing the contingent offers did not constitute [*24] a breach of a fiduciary duty, Defs.' Opp'n at 21; Defs.' Mem. at 15-18; (3) that Veolia did not know its behavior would be aiding and abetting the breach of any fiduciary duty by Amtrak's former employees, Defs.' Opp'n at 18-20; and (4) that Amtrak cannot show that the inclusion of its then-employees on Veolia's bid caused it to lose the SFRTA contract, id. at 15-17; Defs.' Mem. at 25-28. As to Count II, Veolia argues that (1) as a competitive bidder Amtrak did not have a valid business expectancy in the SFRTA contract, Defs.' Mem. at 31-35; (2) Veolia could not have known of Amtrak's business expectancy because it did not know Amtrak was bidding on the contract, id. at 35-37; (3) Amtrak cannot show that it would have been awarded the contract even if Veolia had failed to submit a bid, id. at 37-42; and (4) various theories demonstrate that Amtrak is not entitled to money damages, id. at 42-44.

II. Standard of Review

To grant a motion for summary judgment under *Rule 56(a)*, a court must find that the pleadings, the discovery, and any affidavits "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. [*25] A material fact is one that "might affect the outcome of the suit under the governing law." *Hamilton v. Geithner*, 743 F. Supp. 2d 1, 6 (D.D.C. 2010) (Walton, J.). In showing the existence of a material fact, the non-moving party cannot rely on "mere allegations or deni-

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als," *Burke v. Gould*, 286 F.3d 513, 517, 351 U.S. App. D.C. 1 (D.C. Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)) (internal quotation marks omitted), because "conclusory allegations unsupported by factual data will not create a triable issue of fact," *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 908, 337 U.S. App. D.C. 343 (D.C. Cir. 1999) (internal brackets, quotation marks, and citation omitted). If a party against whom a motion is filed fails to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment for the movant is warranted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). However, the party moving for summary judgment bears the burden of establishing that there is insufficient evidence to support the non-moving party's case. *Id.* at 325. "When ruling on a motion for summary judgment, the courts must view the evidence [*26] in the light most favorable to the non-moving party." *Quigley v. Giblin*, 582 F. Supp. 2d 1, 8 (D.D.C. 2008) (citing *Bayer v. U.S. Dep't of the Treasury*, 956 F.2d 330, 333, 294 U.S. App. D.C. 44 (D.C. Cir. 1992)). Thus, a court "must draw all reasonable inferences in favor of the non[-]moving party, and it may not make credibility determinations or weigh the evidence." *Id.* at 8.

III. Legal Analysis

A. The Defendants' Failure to Exhaust Administrative Remedies Challenge¹⁷

17 The Court will analyze the issues regarding exhaustion of administrative remedies under Florida law because the bids were submitted in Florida, and the Request for Proposals provides that this challenge shall be decided based on Florida Law. See Defs.' Mem., Rauch Decl., Ex. 1 (RFP) § 1.16(d) (stating that unresolved protests are subject to proceedings pursuant to Florida law); *id.* § 2.20 (stating that "[t]he [c]ontract shall be interpreted under[,] and its performance governed by[,] the laws of the State of Florida").

As an initial matter, Veolia seeks summary judgment on Amtrak's claims on the grounds that Amtrak failed to exhaust its administrative remedies. Defs.' Mem. at 44. Amtrak responds that Florida law does not require "an unsuccessful [*27] bidder [to] exhaust administrative remedies before it may sue a competitor." Plaintiff National Railroad Passenger Corporation's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pl.'s Opp'n") at 37.

Under Florida law, "[i]t is improper, if administrative remedies are adequate, to seek relief in [a trial] court before those remedies are exhausted." *Fla. Marine Fisheries Comm'n v. Pringle*, 736 So. 2d 17, 20 (Fla. Dist. Ct. App. 1999) (internal quotation marks and citation omitted). "While ordinarily a plaintiff who has an administrative remedy provided by statute must exhaust that remedy before a court will act to give the same remedy, a plaintiff is not required to pursue administrative remedies where they are not available and adequate," *Berkowitz v. City of Tamarac*, 654 So. 2d 982, 983 (Fla. Dist. Ct. App. 1995) (internal quotation marks and citation omitted), "such as when a plaintiff seeks monetary damages that an administrative forum has no authority to award," *Barry Cook Ford, Inc. v. Ford Motor Co.*, 616 So. 2d 512, 517 (Fla. Dist. Ct. App. 1993).

Pursuant to the Request for Proposals, bidders for the Tri-Rail contract had the right to file a protest [*28] of the SFRTA's decision within 72 hours of the contract's award. Defs.' Mem., Rauch Decl., Ex. 1 (RFP) § 1.16(a) at AMTH 004102; Defs.' Facts ¶ 29. "Failure to file a notice of protest or failure to file a formal written protest . . . [would] constitute a waiver of proceedings." Defs.' Mem., Rauch Decl., Ex. 1 (RFP) § 1.16(d) at AMTH 004103. In the event that such a protest was made and remained unresolved, the protest would be referred to the Florida Division of Administrative Hearings for further proceedings. *Id.*, Rauch Decl., Ex. 1 (RFP) § 1.16(g)-(h) at AMTH 004103-04. While Amtrak considered filing a protest, it never did. See Defs.' Facts ¶¶ 215, 218. However, such a protest would have been ineffective considering the claims asserted by Amtrak.

The Request for Proposals allowed for protests of "the specifications contained in [the Request for Proposals]" and by those who were "affected adversely by [the] SFRTA's decision . . . concerning a solicitation or contract award." Defs.' Mem., Rauch Decl., Ex. 1 (RFP) § 1.16(a)-(b) at AMTH 004102-03. Here, however, Amtrak seeks monetary relief for acts allegedly committed by Veolia, not by the SFRTA. Compl. at 1. In other words, Amtrak [*29] challenges the actions of Veolia and its employees, rather than the specifications of the Request for Proposals or the SFRTA's selection decision. Thus, even if Amtrak had filed a timely protest, neither the SFRTA nor the Division of Administrative Hearings could have granted the relief now being requested by Amtrak in this litigation. See *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1199 (9th Cir. 2008) (noting that exhaustion is generally required in actions against agencies and agency officials, not those between two private parties). Therefore, the Court must deny the defendants' motion for summary judgment based on the plaintiff's alleged failure to exhaust its administrative remedies.

B. The Plaintiff's Aiding and Abetting the Breach of a Fiduciary Duty Claim (Count I)¹⁸

18 The Court will examine Amtrak's claims of aiding and abetting the breach of a fiduciary duty and tortious interference with an economic advantage in accordance with District of Columbia law because, as this Court noted in *Amtrak I*, the standard for adjudicating this claim is the same under Florida law. *592 F. Supp. 2d at 94 n.6, 98 n.7*. Accordingly, a conflicts-of-law analysis is unnecessary.

Amtrak and [*30] Veolia both seek summary judgment on Amtrak's claim that Veolia aided and abetted breaches of fiduciary duties owed to Amtrak by its former employees. Amtrak contends in support of its motion for partial summary judgment that "there is no jury-submissible issue as to any of the[] elements" necessary to prevail on its claim for aiding and abetting a breach of fiduciary duty. Plaintiff National Railroad Passenger Corporation's Reply Brief in Further Support of Its Motion for Partial Summary Judgment ("Pl.'s Reply") at 2. The foundation for its position is that "Amtrak employees Mauck, Salemme and Stencil owed a fiduciary duty of loyalty to Amtrak; they each breached that duty at the behest of Veolia; Veolia (having induced and orchestrated the breach) certainly had knowledge of the breaches; and Veolia (to say the least) substantially assisted and encouraged the wrongful conduct." Pl.'s Mem. at 14-15. More specifically, Amtrak argues that (1) the three employees were all Amtrak employees who owed it an undivided duty of loyalty, *id.* at 15-16; (2) the three employees breached that duty by entering into competition with Amtrak by agreeing to have their names placed on Veolia's bid proposal [*31] for the SFRTA contract, *id.* at 19-21; (3) Veolia was aware that it was aiding and abetting the three employees' breach of their fiduciary duties because it knew the employees worked for Amtrak, the three employees consented to appear on Veolia's bid, and they were subject to a conflict-of-interest policy similar to the one Veolia itself employs, *id.* at 22-23; and (4) Veolia substantially assisted the three employees' breaches by approaching them and offering them contingent job offers if it acquired the SFRTA contract, *id.* at 23-25. In response, Veolia argues that the Court cannot grant the plaintiff's partial motion for summary judgment because "there are genuine issues of material fact [that] preclud[e] summary judgment." Defs.' Opp'n at 1. Veolia contends that factual issues exist because it can show that (1) the former Amtrak employees did not breach a fiduciary duty that was within the scope of their employment, *id.* at 7-15; (2) it could not have known of, nor did it, substantially aid and abet a breach that never occurred, *id.* at 18-21; and (3) Amtrak

cannot establish that it would have been awarded the SFRTA contract had its former employees not agreed to have their names placed [*32] on Veolia's bid for the SFRTA contract, thus precluding Amtrak from establishing an essential element of its breach of a fiduciary duty claim, that is, causation, *id.* at 15-18.

To prevail on its motion for summary judgment on Count I of its Complaint, Amtrak must show that there is no genuine dispute of a material fact as to the following: "(1) a fiduciary duty on the part of the primary wrongdoer, (2) a breach of this fiduciary duty, (3) knowledge of this breach by the alleged aider and abettor, and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing." *Amtrak I*, *592 F. Supp. 2d at 94* (quoting *AmeriFirst Bank v. Bomar*, *757 F. Supp. 1365, 1380 (S.D. Fla. 1991)*); see also *Halberstam v. Welch*, *705 F.2d 472, 477, 227 U.S. App. D.C. 167 (D.C. Cir. 1983)*. Conversely, for Veolia to prevail on its cross-motion for summary judgment on Count I, it must show that there are no genuine disputes of material facts and that those undisputed facts are sufficient to defeat one or more elements of Amtrak's claims regarding any of these four elements, or on the question of whether Amtrak suffered "injuries that were proximately caused by the breach of [its former employees'] fiduciary duties." [*33] *Armenian Genocide Museum & Mem'l, Inc. v. Cafesjian Family Found., Inc.*, *607 F. Supp. 2d 185, 191 (D.D.C. 2009)* (citing *Paul v. Judicial Watch, Inc.*, *543 F. Supp. 2d 1, 5-6 (D.D.C. 2008)*).

1. Fiduciary Duty Owed to Amtrak By the Three Former Amtrak Employees

"Unless otherwise agreed, an agent" owes a fiduciary duty to his principal "to act solely for the benefit of the principal in all matters concerned with his agency." *Gross v. Akin, Gump, Strauss, Hauer & Feld, LLP*, *599 F. Supp. 2d 23, 32 (D.D.C. 2009)*. Thus, the threshold question in determining whether Salemme, Stencil, and Mauck owed a fiduciary duty of loyalty to Amtrak is whether they were "agents" of Amtrak. Whether an agency relationship existed between Amtrak and its three former employees depends, in part, on "(1) the selection and engagement of the [employees], (2) the payment of wages, (3) [Amtrak's] power to discharge [the employees], (4) [Amtrak's] power to control the [employees'] conduct, (5) and whether the work [or conduct at issue] is part of the regular business of the employer." *LeGrand v. Ins. Co. of N. Am.*, *241 A.2d 734, 735 (D.C. 1968)* (quoting *Dovell v. Arundel Supply Corp.*, *361 F.2d 543, 544, 124 U.S. App. D.C. 89 (D.C. Cir. 1966)*); [*34] *Judah v. Reiner*, *744 A.2d 1037, 1040 (D.C. 2000)*. The District of Columbia Court of Appeals has noted that when "the employer has the right to control and direct the servant," then an agency relationship will generally

be found. *Judah*, 744 A.2d at 1040 (quoting *LeGrand*, 241 A.2d at 735). However, it is not the "actual exercise" of control or supervision that is determinative, but merely "the right [of the employer] to control" an employee that "is usually dispositive of whether there is an agency relationship." *Id.* (citing *Safeway Stores, Inc. v. Kelly*, 448 A.2d 856, 860 (D.C. 1982)).

Generally, "[an] agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." *Restatement (Third) of Agency § 8.01* (2006). A "'fiduciary relationship arises when one person . . . manifests assent to another person . . . that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'" *Jenkins v. Strauss*, 931 A.2d 1026, 1033 (D.C. 2007) (quoting *Restatement (Third) of Agency § 1.01*). Accordingly, fiduciary principles are applicable to employees. See *Gov't Relations Inc. v. Howe*, No. Civ. A 05-1081, 2007 U.S. Dist. LEXIS 4952, 2007 WL 201264, at *10 (D.D.C. Jan. 24, 2007) [*35] (stating that in "the field of corporate employment . . . it has been established that employees . . . owe an undivided and unselfish loyalty to the corporation" (citations and internal quotation marks omitted)); see also *Drain v. Virtual Geosatellite Holdings, Inc.*, 631 F. Supp. 2d 32, 39 (D.D.C. 2009) (indicating that "even in the absence of a written contract and even in an employment agreement that is at will, an employee must, as a matter of agency law, act solely for the benefit of her principal in all matters concerning her agency" (citations omitted)). Here, although the three employees were at-will employees, Amtrak had the right to "control and direct . . . [their] work performance[and] the manner in which they conducted their work, and . . . [that] their work was part of the regular business of Amtrak." *Amtrak I*, 592 F. Supp. 2d at 95. Also, Amtrak has a policy prohibiting its employees from engaging in activities that create a conflict of interest with Amtrak. Pl.'s Reply at 8 n.6. Mauck and Stencil each signed a "Certificate of Compliance," certifying that they reviewed and agreed to the policy. Pl.'s Facts ¶¶ 96-97. While Salemme declined to sign the document, he was [*36] aware of his obligations under the policy. *Id.* ¶ 98. ¹⁹ Indeed, "it has been established that employees-especially managers, corporate officers, and directors-owe an undivided and unselfish loyalty to [their corporate employers,] such that there shall be no conflict between duty and self interest," *Gov't Relations, Inc.*, 2007 U.S. Dist. LEXIS 4952, 2007 WL 201264, at *10 (internal quotation marks omitted), and here, Salemme, Stencil, and Mauck were all management-level employees, see Pl.'s Reply at 5; Defs.' Facts ¶¶ 49, 63, 73 (noting that their titles were Assistant Superintendent for Maine Passenger Service, Senior Analyst in Amtrak's Operating Practices Section, and District Manager of Stations, respectively). Mr. Salemme's re-

sponsibilities included "start[ing] a brand new service," and he was tasked with "organiz[ing] and protect[ing] the agreements that Amtrak had . . . with the state agencies." Pl.'s Mot., Orseck Decl., Ex. 32 (Salemme Dep.) at 35:10-36:1. Mr. Stencil, as Senior Analyst in Amtrak's Operating Practices Section, was primarily responsible for training employees. *Id.*, Orseck Decl., Ex. 33 (Stencil Dep.) at 39:18-43:21. He provided training regarding operating rules, customer service, safety, [*37] revenue, and engineering recertification, and also administered operating rules examinations. *Id.* Mr. Mauck managed station operations in four states, which involved "[t]he day-to-day manag[ement] of people." *Id.*, Orseck Decl., Ex. 31 (Mauck Dep.) at 21:2-6, 26:11-28:20. Given the three employees' job responsibilities, the Court agrees that they all owed Amtrak a general duty of loyalty.

19 The Court recognizes that Veolia disputes actual knowledge of this policy, Defs.' Counter Facts ¶ 95, which weighs against Amtrak being entitled to summary judgement.

2. Breach of the Fiduciary Duty

As to this component of its claim, Amtrak first argues that the three employees breached their fiduciary duties by accepting a rival bidder's contingent offers for employment, which created "a substantial financial incentive to see that Veolia, not Amtrak, won the [bid]." Pl.'s Mem. at 19. Second, Amtrak contends that the employees breached their fiduciary duties by permitting Veolia to include their names and résumés with its proposal, *id.* at 20, and by agreeing to withhold their names from Amtrak's bid, Pl.'s Opp'n at 12-13, thus placing themselves "in direct competition with their employer's best [*38] interests," Pl.'s Mem. at 19 (internal alterations, quotation marks, and citation omitted). ²⁰

20 Amtrak also claims that by helping Veolia prepare its bid, the employees breached their employment duties. See Pl.'s Supp. Facts § II ¶ 11. However, the only evidence this Court can find indicating that any of the three employees actually assisted Veolia in preparing its bid was Mr. Birckett asking Mr. Salemme a question relating to an engineering training program, which Mr. Salemme either never answered, Pl.'s Mot., Orseck Decl., Ex. 18 (May 6, 2008 Deposition Transcript of Sidney N. Birckett) ("Birckett Dep.") at 235:4-238:17, or answered by directing Mr. Birckett to the Code of Federal Regulations, *id.*, Orseck Decl., Ex. 32 (Salemme Dep.) at 88:9-90:22. It is therefore questionable whether there was such assistance provided by Mr. Salemme. Moreover, even if the Court had a basis for believing that these former Amtrak employees read

the Request for Proposals, see Pl.'s Opp'n, Declaration of Eva A. Temkin in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment ("Temkin Decl."), Ex. 15 (Birckett-Stencil Email), this alone would not be sufficient to grant Amtrak summary [*39] judgment absent evidence that the employees did more than merely review the Request for Proposals.

Veolia responds that the three employees did not solicit customers or employees for it, that it did not divert any Amtrak corporate opportunities, and it did not misuse any of Amtrak's trade secrets. Defs.' Mem. at 22-23. Instead, Veolia argues, the employees merely prepared to go into competition with Amtrak by making plans to work for Veolia after their employment ended. Id. at 15-16. Furthermore, Veolia posits that the employees were free not to disclose to Amtrak that they intended to work for Veolia so long as they did not compete with Amtrak prior to their separation from its employment. Id. at 16. Veolia contends that the employees acted in accordance with industry custom because "[i]n the government contracts public procurement world, it is custom and practice for contingently hired proposed employees to appear on multiple [bid] proposals." Id. at 24. Veolia also represents that it did not ask the employees to refrain from appearing on Amtrak's bid. Id. at 18. ²¹ Finally, while Veolia concedes that an employee does owe a general duty of loyalty to an employer, it asserts that "there [*40] are genuine issues of material fact as to whether the individual employee's scope of employment was so broad as to include a duty to refrain from accepting a better albeit potential job unrelated to their current work locations and responsibilities," Defs.' Opp'n at 7, and thus beyond their "scope of employment," id. at 9.

21 Veolia argues that because the employees were not bound by any post-termination covenant not to compete, it could not have breached any fiduciary duties owed to Amtrak. Defs.' Mem. at 17, 21-22. The Court finds these arguments unresponsive to Amtrak's theory that the three employees' actions constituted a breach prior to their termination. See Pl.'s Opp'n at 10-12.

Amtrak has identified two separate acts that it maintains amounted to breaches of the three employees' fiduciary duties. Veolia argues that even if these acts occurred, they would not fall within the scopes of the three former employees' employment and therefore could not constitute breaches of their fiduciary duties. The Court will examine each purported act separately.

a. Participation In A Rival's Bid

While employees are not permitted to enter into competition with their employer, they are entitled to

[*41] "make arrangements or plans to go into competition with [their] principal before terminating [their employment] . . ." *Mercer Mgmt. Consulting, Inc. v. Wilde*, 920 F. Supp. 219, 233 (D.D.C. 1996) (quoting *Sci. Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 962 (Del. 1980)). In determining whether an act is a breach or constitutes mere preparation, courts assess whether the employee engaged in "unfair acts" or caused "injury" to his employer. *Gov't Relations*, 2007 U.S. Dist. LEXIS 4952, 2007 WL 201264, at *10 (quoting *Sci. Accessories Corp.*, 425 A.2d at 962). Acts that have been deemed to constitute preparation rather than actual competition include "mere preparation to open a competing business[,] . . . [o]pening a bank account and obtaining office space and telephone service," *Harlee v. Prof'l Serv. Indus., Inc.*, 619 So. 2d 298, 300 (Fla. Dist. Ct. App. 1992), as well as "purchas[ing] a rival business and upon termination of employment immediately compet[ing]" with a former employer, *Gov't Relations*, 2007 U.S. Dist. LEXIS 4952, 2007 WL 201264, at *11 (quoting *Mercer*, 920 F. Supp. at 233); see also *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 494 (Colo. 1989). By comparison, acts that have been found to constitute actual competition [*42] include solicitation of business for an employee's personal endeavor, which otherwise the employee had an obligation to obtain for an employer, competing with the employer for customers or employees, and employee behavior leading to the mass resignation of the employer's workforce. See *Sci. Accessories Corp.*, 425 A.2d at 965; *Mercer*, 920 F. Supp. at 234.

Veolia argues that there is no legal support for the proposition that accepting a contingent offer of employment is a breach of fiduciary duty, Defs.' Opp'n at 14, and Amtrak acknowledges that "[t]here is nothing inherently wrong with the concept of a 'contingent offer,'" Pl.'s Opp'n at 15 n.13. Instead, Amtrak asserts that it is improper for an employee to accept a contingent offer of employment from one company and permit his name to appear on that company's bid for the same contract the employee's current employer is also seeking to acquire. Id. at 14. Further, Amtrak contends that the employees did not merely prepare to compete, but put themselves "in direct competition with the employer's best interests." Id. at 9 (quoting *Amtrak I*, 592 F. Supp. 2d at 95).

This Court and others have held that the fiduciary duty of loyalty may be [*43] breached when an employee participates in the bid of an employer's rival. In *Radio TV Reports, Inc. v. Ingersoll*, 742 F. Supp. 19 (D.D.C. 1990), a corporation sued its former manager after the manager's own newly created corporation won a bid on a contract that was submitted while the manager was still employed by his former corporate employer. Id. at 20. A former member of this Court found that the manager had breached the duty of loyalty owed to his former employ-

er, and assessed liability against him because "[h]ad [the] defendant not breached his duty of loyalty and bid on the contract, [the] plaintiff would have been awarded the contract." *Id.* at 21-22; see *Abbott Redmont Thinlite Corp. v. Redmont*, 475 F.2d 85, 89 (2d Cir. 1973) (determining that largely because of the "likelihood that but for [the defendant's] competition [the plaintiff] would have been awarded the contract . . . [the defendant] violated his fiduciary obligations to [the plaintiff] by submitting competing bids" (emphasis omitted)). But see *Mercer*, 920 F. Supp. at 233 ("[B]efore [*44] the end of [an employee's] employment, he can properly purchase a rival business and upon termination of employment immediately compete." (quoting Restatement (Second) of Agency § 393 cmt. E (1958))).

"[T]he ultimate determination of whether an employee has breached his fiduciary duties to his employer by preparing to engage in a competing enterprise must be grounded upon a thorough[] examination of the facts and circumstances of the particular case." *Mercer*, 920 F. Supp. at 234 (quoting *Md. Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564, 570 (Md. 1978)); see also *Quality Sys., Inc. v. Warman*, 132 F. Supp. 2d 349, 354 (D. Md. 2001) ("There is no set rule denoting when an employee has breached his fiduciary duty; rather, a court must examine the facts of each particular case."). Reflecting upon the facts and circumstances of this case, the employees' conduct was not so egregious that it can be said to have constituted a breach of their fiduciary duties to Amtrak as a matter of law, but neither is it so benign to entitle Veolia to summary judgment on this issue. A reasonable jury could certainly find that by participating in Veolia's bid for the Tri-Rail contract, the management-level employees [*45] were breaching the fiduciary duties they owed to Amtrak, because in doing so they were putting themselves in direct competition with Amtrak. See *Md. Metals*, 382 A.2d at 568 (noting that a "corollary of [the] general principle of loyalty is that a . . . high-echelon employee is barred from actively competing with his employer during the tenure of his employment"). Conversely, a fact-finder could reasonably conclude that the employees' participation in the rival bid was more akin to preparation rather than actual competition. See, e.g., *Crawford & Co. v. M. Hayes & Assocs. L.L.C.*, 13 F. App'x 174, 177 (4th Cir. 2001) (affirming fact-finder's decision that an employee's active recruitment of mid-level managers for a competing business did not constitute the breach of the employee's fiduciary duty).

Further, courts often give weight to whether an employer was given notice that an employee was competing or preparing to compete. Compare *Cudahy Co. v. Am. Labs., Inc.*, 313 F. Supp. 1339, 1346 (D. Neb. 1970) (noting that an employee has a duty to disclose competitive

activity when it may be harmful to his employer), with *Crawford*, 13 F. App'x at 177 (considering the fact that the employer "was [*46] aware of the possibility that [the employee] might resign and form [its own] business" in affirming decision that no breach occurred). Here, there is a dispute as to whether Amtrak had knowledge that its employees were being solicited to participate in Veolia's bid for the SFRTA contract. Amtrak disclaims that it had any such knowledge, Pl.'s Supp. Facts § I ¶ 90, while Veolia claims that "Amtrak managers knew that Veolia was recruiting Amtrak personnel for the Tri-Rail procurement long before the due date for proposals," Defs.' Facts ¶ 90. Given that the Court cannot "weigh conflicting evidence or weigh the credibility of the parties," *Furmanite America, Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1134, 1138 (M.D. Fla. 2007), the Court must defer to the jury as the ultimate fact-finder on this question.

For the several reasons just discussed, the Court concludes that a material question of fact exists as to whether Amtrak's former employees breached their duty of loyalty by allowing their names to be used in connection with Veolia's bid for the Tri-Rail contract. See *Jet Courier Serv.*, 771 P.2d at 494 (reversing trial court's ruling that an employee's pre-termination conversations [*47] with the employer's customers was not a breach of loyalty as a matter of law, because it "involve[d] a question of fact to be determined by . . . a consideration of all the circumstances of the case").

b. Refusal to Participate in Amtrak's Bid

The Court also finds that there is an outstanding dispute that must be resolved by a jury as to whether Veolia induced or required the three former Amtrak employees to refrain from participating in Amtrak's bid. Veolia does not seem to contest that such an inducement would constitute a breach of a fiduciary duty, but rather challenges Amtrak's claim that it has submitted evidence sufficient to eliminate any genuine issue of material fact on this matter. See Defs.' Mem. at 17-21. The Court must therefore review the evidence regarding whether Veolia instructed the three employees to refrain from being associated with Amtrak's bid.

Amtrak bases its position on the following evidence. First, Amtrak points to Jason Steffensen's testimony that Mr. Birckett mentioned he had asked the individuals selected for Veolia's Key Management Team "not to sign up with Amtrak," and "that he suspected that Doug Stencil . . . had broken that agreement . . ." Pl.'s [*48] Opp'n, Declaration of Eva A. Temkin in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment ("Temkin Decl."), Ex.14 (June 4, 2008 Deposition Transcript of Jason Steffensen) ("Steffensen Dep.") at 115:5-15; Pl.'s Opp'n at 13. Second, Amtrak

suggests that Mr. Salemmé's statement during his deposition that he "was involved with [Veolia] already . . . [s]o, [he was] not going to have [his] name in two different places," allows for a reasonable inference that by signing Veolia's contingent offer Mr. Salemmé understood that he was not to have his name submitted on any other bid. Pl.'s Mot., Orseck Decl. Ex. 32 (Salemmé Dep.) at 76:5-20.

In response, Veolia presents affidavits by Mr. Birckett and the three former Amtrak employees denying Amtrak's allegations. See Defs.' Mem., Affidavit of Sidney N. Birckett ("Birckett Aff.") ¶ 11; Mauck Aff. ¶ 10; Affidavit of Douglas W. Stencil ("Stencil Aff.") ¶ 9; Affidavit of Victor W. Salemmé ("Salemmé Aff.") ¶ 7. Veolia also points to the contingent offers themselves, which do not state that they were exclusive agreements. See Pl.'s Mot., Orseck Decl., Ex. 26 (Salemmé Offer), Ex. 29 (Mauck Offer), Ex. 30 (Stencil Offer). Finally, [*49] Veolia observes that Mr. Mauck applied for a position on Amtrak's Key Management Team for the Tri-Rail bid, Defs.' Mem., Mauck Aff. ¶ 8, and, moreover, that Mr. Stencil actually did participate on Amtrak's bid, Defs.' Counter Facts § I ¶ 71; Defs.' Facts ¶ 69.

To survive a summary judgment motion, Amtrak or Veolia need only produce "more than a 'mere existence of a scintilla of evidence' in support of its position," so that a "jury could reasonably find for the non-moving party." *Threadgill v. Spellings*, 377 F. Supp. 2d 158, 160 (D.D.C. 2005) (quoting *Anderson*, 477 U.S. at 252). While Veolia offers more extensive evidence relating to this issue--specifically, four affidavits and four contingent offer letters--whereas Amtrak offers only two deposition testimonial statements, it is the Court's obligation at this stage of the proceedings to "examine[] this evidence in [the] light most favorable to the [non-movant]" as to each motion. *Id.* at 166. Accordingly, because both parties have presented more than a scintilla of evidence, they have satisfactorily demonstrated issues of genuine fact that make summary judgment inappropriate for either party on this element. See *Furmanite America*, 506 F. Supp. 2d at 1138.

3. [*50] Knowledge of the Breach of a Fiduciary Duty

Even if the Court could reach the conclusion that the three employees breached their fiduciary duties to Amtrak, summary judgment would still be inappropriate, as Amtrak has failed to prove the non-existence of an issue of fact as to Veolia's knowledge of the alleged breach by the former Amtrak employees--the third essential element of a claim for aiding and abetting the breach of a fiduciary duty. Veolia also fails to establish the non-existence of a genuine issue of material fact on this component of Amtrak's claim.

Veolia argues that it could not have known it was aiding the breach of a fiduciary duty for three reasons. First, Veolia contends that when it extended contingent offers to the three former Amtrak employees, Amtrak's bidding status was indeterminate. Defs.' Opp'n at 19. Second, Veolia argues it could not have known that the employees "had special agency responsibilities for the Tri-Rail procurement." *Id.* Finally, Veolia posits that because it was following industry custom, it was unaware that its behavior was improper. *Id.* Amtrak responds that Veolia knew all that was necessary for it to have a general awareness of the breaches [*51] because it knew the employees were employed by Amtrak, knew these employees were signing contingent offers with Veolia, knew Amtrak would likely be bidding on the Tri-Rail contract, and knew the employees' participation with Veolia was creating a conflict of interest for the employees because of Veolia's own conflict-of-interest policy. Pl.'s Mem. at 22-23; Pl.'s Reply at 13-17.

"A general awareness of wrongdoing on the part of the one being aided or abetted is sufficient to show knowledge on the part of an aider and abettor." *Amtrak I*, 592 F. Supp. 2d at 96 (citing *Halberstam*, 705 F.2d at 487-88). To establish aiding and abetting liability, "[t]he requisite intent and knowledge may be shown by circumstantial evidence." *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 535 (6th Cir. 2000) (quoting *Metge v. Baehler*, 762 F.2d 621, 625 (8th Cir. 1985)) (internal quotation marks omitted); see also *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978). Ultimately, "the exact level of knowledge necessary for liability remains flexible and must be decided on a case-by-case basis." *Aetna*, 219 F.3d at 535 (quoting *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991)) (internal [*52] quotation marks and modifications omitted).

In *Aetna*, the Sixth Circuit, in determining whether a bank knew a customer to whom it had extended a loan was engaging in tortious conduct, considered the duration of the parties' relationship, the timing of financial transactions, the speed with which the loans were paid off, and the specialized knowledge banks possess. 219 F.3d at 535-36. The court ultimately determined that it would not be unreasonable to conclude that the bank had knowledge of the conduct. *Id.* In particular, the court rejected the argument that just because short-term loans were "commonplace," it was prevented from inferring knowledge of misconduct based on the "context" in which the loan in question was made. *Id.* at 536.

On the record in this case, summary judgment for either party would be inappropriate because both Veolia and Amtrak contest many of the facts central to whether Veolia had knowledge of the alleged breach by Amtrak's former employees. For example, Jason Steffensen testified that "[Mr. Birckett] had asked . . . his key employees

... not to sign up with Amtrak." Pl.'s Opp'n, Temkin Decl., Ex. 14 (Steffensen Dep.) at 115:10-12. If a jury were to credit [*53] this testimony, rather than Veolia's account, see, e.g., Defs.' Mem., Birckett Aff. ¶ 11 ("Neither I nor anyone else at Veolia as far as I am aware ever requested or directed Messrs. Salemme, Stencil, or Mauck to not participate in or support Amtrak's bid"), then it could also reasonably infer that Veolia knew it was engaging in improper behavior. Alternatively, a jury might agree that Veolia was acting in accordance with industry custom, as evidenced by similar behavior having occurred on at least one prior occasion, see Defs.' Facts ¶ 104 (providing an example of another transportation services company including an employee of a competitor in its bid for a contract), and thus had no reason to know that it was engaging in wrongdoing. Finally, there is conflicting evidence as to the certainty with which Veolia should have known Amtrak would be bidding for the Tri-Rail contract. Although Amtrak's final decision to submit a bid was not made until December 2006 or early January 2007, Defs.' Facts ¶ 193, Amtrak did begin advertising on its website for its Key Management Team positions as early as November 2, 2006, id. ¶ 110, its representatives attended a pre-proposal conference, [*54] Pl.'s Facts ¶ 19; Defs.' Counter Facts § I ¶ 19, and it is one of the primary providers of railway services in this country, Pl.'s Mot., Orseck Decl., Ex. 5 (Expert Report of Lonnie E. Blaydes on Behalf of Veolia Transportation Services, Inc. Submitted Sept. 8, 2008) ("Blaydes Rep."), Attach. II at 5 ("the 'Big Three' of Amtrak, Herzog, and Veolia"). A reasonable jury could choose to credit either parties' position, and therefore could accept or reject the defendants' denial of knowledge.

4. Substantial Assistance or Encouragement of the Wrongdoing

Having demonstrated that genuine issues of fact exist regarding whether its three former employees breached their fiduciary duties owed to Amtrak and whether Veolia had knowledge of the purported breaches, in order to avoid summary judgment being awarded to Veolia, Amtrak must also demonstrate either one of the following: that there are genuine issues of material fact as to whether Veolia's conduct amounted to substantial assistance or encouragement of the wrongdoing, or that there are no genuine issues of material fact on this issue and Veolia's conduct did in fact constitute substantial assistance or encouragement.

Veolia argues that its conduct [*55] did not amount to substantial assistance or encouragement, relying on many of the same arguments it has advanced already. See Defs.' Opp'n at 21 (that its conduct "conform[ed] to industry standards[,] that the former Amtrak employees' actions were "beyond the scope of [their] employment[,]"

that the "employees [were] free to prepare to compete[,] and that it had "no knowledge" that it was aiding and abetting the breach of any fiduciary duty by Amtrak's former employees). Amtrak responds by pointing out that it was Veolia that approached the three former Amtrak employees, it was Veolia that extended contingent offers to them, and it was Veolia that signed the Key Employee Certification forms on behalf of the three employees. Pl.'s Reply at 13-14.

As noted earlier, "in order to establish aiding and abetting liability, a plaintiff must prove that the defendant provided 'substantial assistance or encouragement to the primary party in carrying out the tortious act.'" *Aetna*, 219 F.3d at 537 (quoting *Andonian v. A.C. & S., Inc.*, 97 Ohio App. 3d 572, 647 N.E.2d 190, 192 (Ohio Ct. App. 1994)) (internal quotation marks omitted). In other words, a plaintiff must show that the defendant proximately caused the violation [*56] or was a substantial factor in causing the tort. *K & S P'ship v. Cont'l Bank, N.A.*, 952 F.2d 971, 979 (8th Cir. 1991) (citing *Metge*, 762 F.2d at 624). Facts to consider in determining whether substantial assistance or encouragement was provided in an aiding and abetting claim include, "[t]he nature of the act encouraged[;] the amount [and kind] of assistance given; the defendant's absence or presence at the time of the [alleged] tort; [the defendant's] relation to the tortious actor; and the defendant's state of mind." *Amtrak I*, 592 F. Supp. 2d at 96 (quoting *Halberstam*, 705 F.2d at 483-84).

Based on the current record in this case, it is undisputed that Veolia extended contingent offers to the three former Amtrak employees. Defs.' Facts ¶¶ 56, 68, 83. It is also undisputed that Veolia submitted with their bid proposal Key Employee Certification forms signed by these former employees. Defs.' Mem., Mauck Aff. ¶ 7; Stencil Aff. ¶ 6; Salemme Aff. ¶ 5. However, there are genuine issues of material fact as to whether Veolia participated in a tortious act, i.e., aiding and abetting breach of a fiduciary duty, see supra Part III.B.2., and thus whether Veolia gave substantial assistance or [*57] encouragement "in carrying out the tortious act," *Aetna*, 219 F.3d at 537. Therefore, a finding in Amtrak's favor as to the fourth element of the aiding and abetting claim is precluded.

Thus, while the Court has determined that the three former Amtrak employees owed a general duty of loyalty to Amtrak, genuine issues of material fact preclude the issuance of summary judgment for either party on the remaining three elements of the plaintiff's aiding and abetting the breach of a fiduciary duty claim. Therefore, the Court finds that neither party is entitled to summary judgment on Count I of the plaintiff's Complaint.²²

22 The mere filing of cross-motions for summary judgment does not require the Court to grant the requested relief to one of the parties where there are genuine issues of fact throughout the record, which preclude summary judgment in favor of either party. See 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.10[6] (3d ed. 2004) (explaining that "denial of one cross-motion does not imply the grant of the opponent's cross-motion").

C. The Plaintiff's Tortious Interference with an Economic Advantage Claim (Count II)²³

23 As noted above, see supra note 18, the Court will [*58] examine Amtrak's claim of tortious interference with an economic advantage in accordance with District of Columbia law.

Veolia also moves for summary judgment on Count II of the Complaint, which alleges tortious interference with Amtrak's business expectancy associated with the Tri-Rail contract. Defs.' Mot. at 1-2; Defs.' Mem. at 29. Veolia argues that Amtrak did not have a valid expectancy in winning the SFRTA contract because: (1) Veolia's competitive activity was "privileged," Defs.' Mem. at 31; (2) there is a per se rule against any business expectancy by an unsuccessful bidder for a government contract, id. at 31-33; and (3) Amtrak's expectation of winning the contract was not commercially reasonable, id. at 34-35. Veolia goes on to argue that it had neither the necessary knowledge of Amtrak's expectancy nor the intent to interfere with it. Id. at 35-37. Veolia further asserts that its actions did not cause Amtrak to lose the SFRTA contract and directs the Court's attention to the point differential between Amtrak's and Veolia's bids as support, arguing that Veolia would have been able to submit a successful bid regardless of the three employees' cooperation, and that Amtrak would [*59] not have been awarded the contract even if it had been the sole bidder. Id. at 40-41; Defendants' Reply Memorandum of Points and Authorities in Further Support of Their Motion for Summary Judgment ("Defs.' Reply") at 21-22, 24-25.

Amtrak responds that there exists neither a "privilege of competition" nor a "per se no expectancy rule," and also disputes that its expectation was unreasonable. Pl.'s Opp'n at 19, 22, 24. Further, Amtrak maintains that the knowledge element is satisfied because Veolia knew Amtrak was a likely bidder. Id. at 26-28. Finally, Amtrak responds to Veolia's causation challenge noting that without Amtrak's three former employees Veolia would not have been able to submit a bid and, as a consequence, Amtrak would have been awarded the contract. Id. at 29, 32.

As this Court noted in *Amtrak I*, the requisite elements to a successful claim of tortious interference with a prospective economic advantage are "(1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant [*60] damage." 592 F. Supp. 2d at 98 (quoting *Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002)). The Court will consider each element in turn.

1. Existence of Valid Business Relationship or Expectancy

Veolia proffers three reasons as to why it believes Amtrak did not have a valid business expectancy. First, Veolia argues that Florida law recognizes a privilege of competition that preempts any expectancy a participant in a competitive bidding process might otherwise have. ²⁴ Defs.' Mem. at 31. Second, Veolia contends that the District of Columbia has adopted a "per se no expectancy rule," which precludes disappointed bidders from sustaining a tortious interference claim. Id. at 31-32. Third, Veolia relies on Amtrak's prior failure to submit or successfully submit bids in the competitive bidding arena to demonstrate that Amtrak did not have a reasonable business expectancy that it would acquire the SFRTA contract. Id. at 34-35.

24 Veolia's reliance on Florida law for its privilege of competition and the preemption of expectancy arguments does not preclude the Court from examining these arguments under District of Columbia law because the Court understands both arguments to be based on uniform [*61] principles of law. See *Mfg. Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037, 1040 (11th Cir. 1982) ("Although businesses are accorded leeway in interfering with their competitors' business relationships, they must abide by certain 'rules of combat' and not use improper means of competition." (quoting W. Prosser, *Torts* 956 (4th ed. 1971))); see also *Insurance Field Services, Inc. v. White & White Inspection & Audit Service, Inc.*, 384 So. 2d 303, 306-08 (Fla. Dist. Ct. App. 1980) (noting that the privilege of competition did not protect against an employee's unjustifiable interference in anticipation of competition); *Furash & Co. v. McClave, et al.*, 130 F. Supp. 2d 48, 56 (D.D.C. 2001) ("Intentional interference with prospective economic advantage requires intentional and improper interference with business expectancies [T]he defendant's interference must be improper." (internal quotation marks and citations omitted)). Therefore, the Court will ex-

amine this principle in accordance with District of Columbia law for the reason noted earlier. See *supra* note 18.

Amtrak responds to Veolia's assertions by arguing that the privilege of competition protects parties only so long as [*62] they "abide by certain 'rules of combat' and not use improper means of competition." Pl.'s Opp'n at 23 (quoting *Mfg. Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037, 1040 (11th Cir. 1982)). Amtrak also argues that the cases cited by Veolia in support of a "per se no expectancy rule" actually only hold that disappointed bidders have no expectancy where they did not submit qualifying proposals in the first place. *Id.* at 24-25. Finally, Amtrak contests that the assertion that it was commercially unreasonable for it to expect to win the contract, citing contrary evidence demonstrating Amtrak's positive competitive record, its close ties to Florida, the beliefs of its own employees in Amtrak's success, and the fact that Veolia and Amtrak were the only bidders on the Tri-Rail contract. *Id.* at 19-21.

Legitimate business expectancies are those "not grounded on present contractual relationships but which are commercially reasonable to anticipate, [and] are considered to be property and therefore protected from unjustified interference." *Carr v. Brown*, 395 A.2d 79, 84 (D.C. 1978). "A legally recognizable business expectancy may include 'the opportunity of obtaining customers,'" *Amtrak I*, 592 F. Supp. 2d at 98 [*63] (quoting *Carr*, 395 A.2d at 84), that is "commercially reasonable to anticipate," *id.* (quoting *Whelan v. Abell*, 953 F.2d 663, 673, 293 U.S. App. D.C. 267 (D.C. Cir. 1992)). Disappointed bidders attempting to demonstrate a valid business expectancy must therefore show a "reasonable likelihood" of receiving a contract. See *Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 850 (D.D.C. 1996) (citing *Klein v. Grynberg*, 44 F.3d 1497, 1506 (10th Cir. 1995)). Mere "speculative contractual expectations," *id.* (citing *CACI Int'l, Inc. v. Pentagen Techs. Int'l, Ltd.*, Nos. 94-2058, 94-2220, 1995 U.S. App. LEXIS 32067, 1995 WL 679952, at *5 (4th Cir. Nov. 16, 1995)), or "hope" are insufficient, *id.* (citing *Klein*, 44 F.3d at 1506). "Where the ultimate decision to enter into a business relationship is a highly discretionary decision reposed within . . . a governmental entity, it becomes more difficult for a plaintiff to prove that it had an expectancy of doing business . . ." *Mago Constr. Co. v. Anderson, Eckstein & Westrick, Inc.*, No. 183479, 1996 Mich. App. LEXIS 577, 1996 WL 33348794, at *2 (Mich. Ct. App. Nov. 8, 1996).

While Veolia asks the Court to recognize a per se no expectancy rule, none of the cases offered by Veolia support the conclusion that a disappointed [*64] bidder in a government procurement process can never establish a legitimate business expectancy. For example, in *Wash-*

ington Metropolitan Area Transit Authority v. Quik Serve Foods, Inc., Nos. 04-838 (RCL), 04-687 (RCL), 2006 U.S. Dist. LEXIS 24510, 2006 WL 1147933 (D.D.C. Apr. 28, 2006), the Court held that a plaintiff had "not [pleaded] sufficient facts to demonstrate the probability of [a] future business expectancy" where the plaintiff had entered into discussions to sell a piece of property it did not itself own. 2006 U.S. Dist. LEXIS 24510, [WL] at *6. This, a member of this Court found, "demonstrate[d] that the future business relationship was speculative and not probable," *id.*, but at no point did the Court suggest that a plaintiff could never establish the probability of such a future relationship. In *Houlahan v. World Wide Ass'n of Specialty Programs & Schools*, No. 04-01161 (HHK), 2006 U.S. Dist. LEXIS 17093, 2006 WL 785326 (D.D.C. Mar. 28, 2006), another member of this Court also found no business expectancy, but did so by analogizing the status of a freelance journalist to that of an at-will employee, vis-a-vis their employer, a relationship the District of Columbia Court of Appeals had found insufficient to create a prospective business expectancy. 2006 U.S. Dist. LEXIS 17093, [WL] at *4. [*65] Again, the Court in *Houlahan* did not foreclose the possibility that a plaintiff could establish a prospective business expectancy in the context of contract bidding. In *Ellsworth*, the Court did not adopt a per se no expectancy rule, but instead held that a party's expectation must be shown to have been reasonable. 917 F. Supp. at 850. Furthermore, in *Carr*, a real estate developer was delayed from developing his property because the city government's transportation committee and zoning board did not give him immediate approval based on statements by the defendant, who opposed the development. 395 A.2d at 82-83. The court noted that protected expectancies arise where "there is a background of business experience on the basis of which it is possible to estimate . . . the likelihood that the plaintiff would have received [the contract's benefits] if the defendant had not interfered." *Id.* at 84. The court went on to conclude that *Carr* was not such a case because the plaintiff did not have a reason to "expect upon the basis of any experience that his application w[ould] be automatically approved within a specified period of time." *Id.* Similarly, in *Klein*, the plaintiff failed to show a prospective [*66] business advantage where he had developed a security device and the defendant interfered with his efforts to secure investors. 44 F.3d at 1505-06. The court based its holding in *Klein* on the plaintiff's lack of an ongoing relationship with the investors, having had only one meeting with each investor, and offering no evidence that the prospective investors were actually intending to finance his security system. *Id.* at 1506. Based on its analysis of these cases, the Court cannot find that a per se no expectancy rule reflects the current state of the law. In fact, another member of this Court actually found to the contrary. See

Oceanic Exploration Co. v. ConocoPhillips, Inc., No. 04-332 (EGS), 2006 U.S. Dist. LEXIS 72231, 2006 WL 2711527, at *1-2, 20 (D.D.C. Sept. 21, 2006) (holding that because a party lost the opportunity to bid on a contract as a result of the alleged actions of the defendant, the "plaintiffs . . . demonstrated a reasonable likelihood or probability that, but for the alleged interference . . . a contract would have resulted" and therefore had pleaded sufficient facts to assert a claim of tortious interference); see also *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1300 (8th Cir. 1980) (rejecting [*67] a per se no expectancy rule because "[t]he more logical approach . . . is to put the unsuccessful bidder to its proof; if it proves by a preponderance of the evidence that it would have received the contract award absent the successful bidder's wrongdoing, we find no persuasive reasons why recovery should be denied").

Here, Amtrak has produced evidence of its business experience from which a reasonable fact-finder could conclude that Amtrak had a reasonable business expectancy in acquiring the SFRTA contract. Specifically, Amtrak has shown that it has a strong presence in commuter rail operations. See Pl.'s Supp. Facts § II ¶ 3. Moreover, it contends that it "had outscored Veolia, head-to-head, in at least two recent bid competitions for similar commuter rail operations contracts." *Id.* § II ¶ 4. Finally, Veolia's own expert described Amtrak as one of "the Big Three" in providing commuter rail services. Pl.'s Mot., Orseck Decl., Ex. 5 (Blayde Rep.) Attach. II at 5. Although Veolia contends that Amtrak has not won any competitive procurement contracts since the end of 2001, Defs.' Facts ¶¶ 12, 251; Defs.' Reply Facts § I ¶ 12, Amtrak has presented more than a "scintilla" of evidence of [*68] its business expectancy, see *Anderson*, 477 U.S. at 252, by establishing that, unlike the plaintiff in *Carr*, there is evidence from which a reasonable juror could infer that Amtrak had a good possibility of securing the contract, but for Veolia's purported improper actions, see *Carr*, 395 A.2d at 84.

Although it will be a significant challenge for Amtrak to prove this element of its tortious interference with economic advantage claim, the Court finds that genuine issues of material fact exist concerning whether it can.²⁵

²⁵ Veolia cites *International Expositions, Inc. v. City of Miami Beach*, 274 So. 2d 29, 31 (Fla. Dist. Ct. App. 1973), and *Ahern v. Boeing Co.*, 701 F.2d 142 (11th Cir. 1983), for the proposition that Florida law recognizes a privilege to interfere with a non-exclusive right. Defs.' Mem. at 31. This proposition is inapplicable to the present case, however, because the interference alleged by Amtrak concerns its exclusive right to the ser-

vices of its employees. See Pl.'s Opp'n at 5. A case that more accurately reflects the facts of this case is *Insurance Field Services*, 384 So. 2d 303, where the court found the privilege of competition insufficient to immunize an independent [*69] contractor who had acted disloyally in an employee-employer context from liability on a charge of interference with a business relationship. *Id.* at 307-08. In *Insurance Field Services*, the court stated that whether intentional interference was unjustifiable "depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances among which the methods and means used and the relation of the parties are important." *Id.* at 306-07 (citing *Restatement (Second) of Torts* § 767 (1979)). As in that case, Veolia is charged with inducing disloyal behavior on the part of Amtrak's former employees, an act not protected under either Florida or District of Columbia law. See *id.* at 307-08 (holding that the privilege of competition did not protect an employee from liability for engaging in disloyal behavior in anticipation of competing with his employer during the course of his employment); *Furash & Co. v. McClave*, 130 F. Supp. 2d 48, 56 (D.D.C. 2001) (holding that genuine issues of material facts existed as to whether the defendant "improperly solicited clients for her personal [*70] benefit in order to interfere with [the plaintiff's] business relationships").

2. Veolia's Knowledge of the Relationship or Expectancy

To satisfy the second element of a tortious interference claim, a plaintiff "must show that an interferer knew of the business expectancy." *Amtrak I*, 592 F. Supp. 2d at 98-99 (citing *Bennett Enters., Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499, 310 U.S. App. D.C. 192 (D.C. Cir. 1995); *Smith v. Ocean State Bank*, 335 So. 2d 641, 643 (Fla. Dist. Ct. App. 1976)). A party need not be shown to have had actual awareness of a business expectancy, but may be found to have knowledge of the expectancy provided that "a person believes that it is probable that something is a fact, but deliberately shuts his or her eyes or avoids making reasonable inquiry with a conscious purpose to avoid learning the truth." *Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, No. 99-1357, 2000 U.S. App. LEXIS 3394, 2000 WL 248170, at *5 (4th Cir. Mar. 6, 2000).

Veolia argues that it could not have known that its actions would interfere with Amtrak's business expectancy because it did not know how many bidders would participate in the procurement process, whether Amtrak

would be one of them, or whether any [*71] of the bidders were more likely than others to be awarded the Tri-Rail contract. Defs.' Mem. at 35-37. Amtrak answers that "Veolia's senior management obviously was aware that Amtrak would likely be a competitor," Pl.'s Opp'n at 27, because although Amtrak did not make a final decision to bid on the contract until late December 2006 or early January 2007, Defs.' Facts ¶ 193; Pl.'s Supp. Facts § I ¶ 193, among other things, "Amtrak advertised on its public website for all of the Key Management Team positions" as early as November 2, 2006, Defs.' Facts ¶ 110; Pl.'s Supp. Facts § I ¶ 110.

In *Tuxedo Contractors, Inc. v. Swindell-Dressler Co.*, 613 F.2d 1159, 198 U.S. App. D.C. 426 (D.C. Cir. 1979), the defendants allegedly induced a general contractor into withdrawing from its agreement to use the plaintiff's services and instead to use the services of the defendants. *Id.* at 1161. The court found for the defendants, noting that although the defendants "suspected" that a contract existed between the plaintiff and the general contractor, based on the defendants' responses to interrogatories and their "manifested awareness" of the contract during meetings between them and the general contractor, the defendants could [*72] not be considered to have had the requisite knowledge necessary for a tortious interference claim because they were entitled to rely on the assurances provided by the general contractor that there would be no contractual conflicts. *Id.* at 1163-64. In contrast, Veolia approached Amtrak "very early in the process" about forming a partnership for the SFRTA contract, but was informed by Amtrak that "[t]hey weren't sure they were going to go after it." Pl.'s Mot., Orseck Decl., Ex. 20 (May 21, 2008 Deposition Transcript of Ronald J. Hartman) ("Hartman Dep.") at 78:10-14, 79:7-12. While this clearly reflected uncertainty by Amtrak, it did not convey the firm assurance the defendants received from the general contractor in *Tuxedo*, 613 F.2d at 1163-64, and thus, is insufficient to support a definitive finding that Veolia did not have knowledge of Amtrak's business expectancy. In any event, even if Amtrak had given Veolia a firm assurance regarding its intentions with respect to bid proposals at that time, this Court would still have to consider whether there is any "independent evidence" in the record from which a jury could nonetheless infer that Veolia knew that Amtrak would submit a competitive [*73] bid. See *id.* at 1164 (citing *Hunter Vending Co. v. D.C. Vending Co.*, 345 A.2d 142, 144 (D.C. 1975); *Deoudes v. G.B. Macke Corp.*, 153 A.2d 309, 311 (D.C. 1951)).

Although Amtrak did not finalize its decision to bid on the Tri-Rail contract until late December, 2006 or early January, 2007, Defs.' Facts ¶ 193, as noted it did start advertising for its Key Management Team positions on its public website as early as November 2, 2006, *id.* ¶

110. Moreover, there is evidence that Veolia was aware of the postings. See Pl.'s Mot., Orseck Decl., Ex. 18 (May 6, 2008 Deposition Transcript of Sidney N. Birkett) ("Birkett Dep.") at 119-20 (Mr. Birkett admits that Mr. Salemme said to him that "I hear Amtrak is bidding [on the Tri-Rail project]"). Finally, Veolia saw Amtrak representatives at a pre-bid conference in October 2006, almost three months before Veolia submitted its bid. Pl.'s Facts ¶ 19. From this evidence, a reasonable jury could find, regardless of when Amtrak made its final decision to make a bid, that Veolia was aware that Amtrak was recruiting for the purpose of submitting a bid. Beyond merely knowing that Amtrak was going to, or likely would, submit a bid, Veolia also knew, according [*74] to Amtrak, that Amtrak had previously prevailed over it in securing competitive contracts on other projects, Pl.'s Supp. Facts § II ¶ 4, and thus would have known that Amtrak was a competitive threat. The Court therefore disagrees with Veolia's contention that it could not have known that Amtrak was likely to submit a competitive bid, thus creating another genuine issue of material fact concerning the knowledge element of Amtrak's tortious interference of business expectancy claim.

3. Intentional Interference By Inducing or Causing a Termination of the Expectancy

The third element of a claim of tortious interference is an "intentional interference inducing or causing a breach or termination of the relationship or expectancy." *Amtrak I*, 592 F. Supp. 2d at 98 (quoting *Browning*, 292 F.3d at 242). "[A] general intent to interfere or knowledge that conduct will injure the plaintiff's business dealings is insufficient to impose liability," but rather a "strong showing of intent to disrupt ongoing business relationships" is necessary. *Bennett*, 45 F.3d at 499 (quoting *Genetic Sys. Corp. v. Abbott Labs.*, 691 F. Supp. 407, 423 (D.D.C. 1988)) (internal quotation marks omitted). "[T]he conduct at [*75] issue must involve egregious conduct such as libel, slander, physical coercion, fraud, misrepresentation, or disparagement." *PM Servs. Co. v. Odoi Assocs., Inc.*, No. Civ. A. 03-1810 (CKK), 2006 U.S. Dist. LEXIS 655, 2006 WL 20382, at *35 (D.D.C. Jan. 4, 2006) (quoting *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27, 34 (D.D.C. 1999)) (internal quotation marks omitted). Because this element requires demonstrating both an "intentional interference" and that this interference "induc[ed] or caus[ed] a breach or termination," *Browning*, 292 F.3d at 242, the Court must assess whether there is evidence in the record of both intent and causation.

a. Intent

In *Bennett*, a pizza store franchisee demonstrated that his franchisor disclosed damaging, but truthful in-

formation, about the state of the franchisee's financial situation to potential buyers of the franchisee's business, contributing to the franchisee's failure to sell the business at the high price he wished to acquire. *45 F.3d at 496, 499*. The Bennett court held that, without additional evidence, the plaintiff's evidence of "ill motive or intent" on the franchisor's part "to disrupt [the franchisee's] economic advantage" was based on nothing more [*76] than pure "speculation." *Id. at 499*. Here, Amtrak's evidence raises a factual question of whether Veolia's contingent offers were intended to harm Amtrak.²⁶ There is no evidence that Veolia knew Amtrak had identified Stencil and Salemme as possible members of its own Key Management Team for its bid on the Tri-Rail contract prior to Veolia extending its contingent offers to them. It is also uncontested that Veolia itself considered multiple candidates for its Key Management Team positions, Pl.'s Supp. Facts § I ¶¶ 45, 59, 71, suggesting that Veolia's only intention was to compete fairly for the Tri-Rail contract.

26 Amtrak contends that Veolia must have been aware that it was acting improperly because Veolia's own "Conflict of Interest" policy prohibited the behavior Veolia committed. See Pl.'s Reply at 15. Veolia's conflict-of-interest policy language relied upon by Amtrak prevents Veolia's employees from "appropriat[ing] or divert[ing] to any other person or entity a business or financial opportunity that the employee . . . knows or should know [Veolia] might want to pursue." Pl.'s Mot., Orseck Decl., Ex. 49 (Veolia Conflict of Interest Policy) at 10. This language does not definitively [*77] prove Amtrak's position, and therefore a fact-finder, not the Court as a matter of law, must determine whether the acceptance of contingent offers by employees of a rival bidder qualifies as "appropriating or diverting" a business or financial opportunity.

Veolia's position is further strengthened by evidence that it was acting in accordance with industry custom and not intending to disrupt Amtrak's business operations, although this assertion is highly disputed by Amtrak. See Defs.' Mem. at 24-25; Pl.'s Opp'n at 14-16. Veolia supports its position by demonstrating that making the kind of contingent offers tendered in this case has occurred on at least one occasion in the past. Defs.' Facts ¶ 104.²⁷ Veolia's actions may also prove unremarkable considering that one of the members of the SFRTA's evaluation team found that Stencil's appearance on two bids "didn't really matter," even though the Evaluation Committee had the résumés of all the employees and would have been able to see that Stencil was at that time still employed by Amtrak. Defs.' Mem., Rauch Decl., Ex. 66 (May 27, 2008 Deposition Transcript of Ed Woods)

("Woods Dep.") at 53:8-25. Finally, the fact that Amtrak extended [*78] offers to Herzog employees when it had not been definitively established that Herzog would not be seeking renewal of the Tri-Rail contract provides peripheral support for Veolia's belief that its conduct did not amount to interference with Amtrak's bid. See Pl.'s Mot., Orseck Decl., Ex. 15 (Arnold Dep.) at 54:24-55:11, Ex. 16 (Steffensen Dep.) at 55:8-56:1; Pl.'s Opp'n, Temkin Decl., Ex. 4 (May 23, Deposition Transcript of Joseph T. Yannuzzi) ("Yannuzzi Dep.") at 149:10-151:7. All of these facts lend support for Veolia's claim that its intent was merely to submit a competitive bid and not to hijack Amtrak's business expectancy.

27 While Amtrak has pointed out that the example Veolia references is the only example Veolia has presented, Pl.'s Supp. Facts § I ¶ 104, Amtrak has produced no evidence showing that this example is atypical of a wider practice.

Despite what may ultimately prove to be mere preparation rather than actual competition by Amtrak's three former employees, Amtrak's claim that Veolia sought to prevent Amtrak's own employees from participating in Amtrak's bid cannot be overlooked and raises a genuine factual dispute over whether this was, in fact, Veolia's intent. See [*79] *supra* Part III.B.2. In *PM Services*, the court identified two alleged actions by the defendants as sufficient "to meet the requirement of egregious conduct sufficient to establish intentional interference." *2006 U.S. Dist. LEXIS 655, 2006 WL 20382, at *36* (internal quotation marks omitted). These actions were one defendant's misappropriation of confidential information and knowing use of "his position and relationship . . . to divert business opportunities away from his employer," and the other defendant's misrepresentation of information in company brochures. *Id.* Amtrak's claim here is similar because, based on the record in this case, a reasonable jury could find that the three employees breached their duties of loyalty to Amtrak, and that there is a genuine factual dispute over whether or not Veolia knew it was assisting them in perpetrating the breaches by encouraging them, or even requesting, that they refrain from being associated with Amtrak's bid. See *supra* Part III.B.3. A fact-finder could conclude that extracting such an agreement from Amtrak's former employees is "a strong showing of intent," *Bennett, 45 F.3d at 499*, to undermine Amtrak's bid. The fact that the record supports such a finding weighs [*80] against Veolia being entitled to summary judgment on Amtrak's tortious interference claim. Furthermore, "when there is room for different views, the determination of whether [an] interference was improper or not is ordinarily left to the jury." *Restatement (Second) of Torts § 767 cmt. 1* (1979).

b. Causation

The Court also finds that a genuine issue of material fact exists on the question of causation. Veolia argues that even if it had not engaged in the conduct challenged by Amtrak, it still would have been able to submit "a qualifying bid." Defs.' Reply at 21-23. First, Veolia points out that it had qualified alternative candidates for all of its Key Management Team positions. *Id.* at 22-23; Defs.' Mem. at 40-41. Moreover, Veolia argues that Amtrak cannot demonstrate causation because the SFRTA was free to reject all bids submitted to it, Defs.' Reply at 24-25, and that is likely the course it would have taken if Veolia had not submitted a qualifying bid, due to the high cost of Amtrak's proposal, which greatly exceeded that of Veolia's proposal, Defs.' Reply at 24; see also Defs.' Mem. at 40. Amtrak argues in response that causation has been established because if Veolia had not acted [*81] as it did, then Veolia would not have been able to submit a bid at all, and Amtrak would have been awarded the contract by default. Pl.'s Reply at 19.²⁸ Amtrak therefore disputes that Veolia's alternative candidates would have allowed it to submit a successful bid. Pl.'s Opp'n at 30-32. Finally, Amtrak argues that the SFRTA would have had no realistic alternative but to accept Amtrak's bid, had Amtrak been the only bidder, because "neither Herzog nor [the] SFRTA wanted Herzog to continue as the contractor" and the timing of the expected expiration of that relationship would not have afforded the SFRTA time to initiate another round of proposals. *Id.* at 32-33.

28 Veolia also argues that Amtrak cannot prove causation because of the vast disparity between the final scores awarded to Amtrak's and Veolia's bid proposals. Defs.' Mem. at 39-40. The Court finds this argument inapplicable to Amtrak's theory of causation, which essentially states that Veolia would not have been able to submit a competitive bid without the use of Amtrak's three former employees, thus, resulting in Amtrak having been awarded the SFRTA contract as the only bidder. See Pl.'s Reply at 19.

Veolia could prevail on its [*82] summary judgment motion so far as the causation component of Amtrak's tortious interference claim is concerned under either of two circumstances. First, if Veolia can demonstrate that there is no genuine factual dispute regarding its ability to have submitted a winning bid without including the three former Amtrak employees as part of its bid, then Veolia's actions, even if improper, could not have caused Amtrak any harm. Alternatively, if the SFRTA would have rejected Amtrak's bid even if Amtrak's bid was the only suitable option, then Veolia's actions also could not have deprived Amtrak of any business expectancy since, independent of what Veolia had done, Amtrak would not have been awarded the con-

tract. The Court will consider each of these alternatives in turn.

Amtrak argues that there is a genuine issue of material fact as to whether Veolia would have been able to submit a bid at all without including its three former employees. Pl.'s Opp'n at 29, 31. Amtrak proffers an argument similar to the argument advanced in *Industrial Door Contractors, Inc. v. United States*, 79 Fed. Cl. 413 (Fed. Cl. 2007), where the court refused to award lost profits to a disappointed bidder because that [*83] bidder's proposal did not satisfy all of the product needs of the government. *Id.* at 424. Here, the SFRTA's Request for Proposals warned that "[p]roposals [would] be rejected if found to be conditional, irregular or not in conformance with the requirements and instructions contained herein." Pl.'s Mot., Orseck Decl., Ex. 8 (RFP) § 1.10.2 at AMTH 003678. The Request for Proposals required that members of the Key Management Team "must possess a minimum of 3 years of recent experience (i.e., within the past 5 years) as the operator of a passenger railroad service . . ." *Id.*, Orseck Decl., Ex. 8 (RFP) § 3.1 at AMTH 003718. Additionally, "[o]nly those Technical Proposals determined by the Evaluation Committee to be responsible and responsive (determined to be complete and in full and total compliance with all stated requirements), at [the SFRTA's] discretion [would] be considered." *Id.*, Orseck Decl., Ex. 8 (RFP) § 1.13 at AMTH 003682. And, the SFRTA has in the past rejected proposals for being non-responsive. Defs.' Mem., Rauch Decl., Ex. 101 (May 28, 2008 Deposition Transcript of Brad Barkman) ("Barkman Dep.") at 38:2-16. Because Amtrak alleges that without its three former Amtrak employees, [*84] Veolia would not have been able to identify members of its Key Management Team who met the requirements of the Request for Proposals, the Court must consider whether the positions could have been filled by qualified alternative candidates.

Based on the record evidence, a reasonable factfinder could conclude that Veolia would not have been able to submit a successful bid absent the commitments it secured from the three former Amtrak employees. For example, while Veolia's bid may not have been found to be unresponsive for failing to meet the requirements as to only one member of its Key Management Team,²⁹ see Pl.'s Mot., Orseck Decl., Ex. 8 (RFP) § 1.10.2 at AMTH 003678 ("A responsive Proposal is an offer which complies with and conforms to the requirements of the RFP. Proposals which, in the opinion of [the] SFRTA, are non-responsive will be rejected."); *id.*, Orseck Decl., Ex. 8 (RFP) § 3.1 at AMTH 003718 ("[E]ach member of the . . . Key Management Team must possess a minimum of 3 years of recent experience (i.e. within the past 5 years) as the operator of a passenger railroad service."), that may not have been the conclusion had Veolia failed to identi-

fy two or more members of the [*85] team who had the necessary qualifications as Amtrak asserts would have been the case had Veolia not improperly solicited Amtrak's employees. There also exists the possibility that Veolia would have forgone even submitting a bid if it felt it would have been unable to submit a responsive proposal. However, it is the task of the fact-finder to weigh these possibilities, not this Court. *Anderson*, 477 U.S. at 250, 255. Therefore, because the adequacy of the alternate candidates creates a genuine issue of material fact, this too cuts against Veolia being entitled to summary judgment on Amtrak's tortious interference claim.

29 The Court notes that Amtrak's proposed Key Management Team included one member, Angel Torress, that lacked the required 3 years of recent railroad service experience. Defs.' Reply Facts § III ¶¶ 41, 43, 44.

Even if no question of fact existed as to whether Veolia would have been able to submit a winning bid without the three former Amtrak employees, a factual question on lack of causation would still exist if Amtrak can demonstrate that it would have been awarded the contract despite the higher costs of its bid. Admittedly, Veolia has demonstrated that the SFRTA was free [*86] to reject all proposals at its discretion, including because it failed to receive a reasonably priced proposal. Defs.' Facts ¶¶ 28, 256. Veolia argues that it was not reasonably likely that Amtrak's bid would have been successful under any circumstances due to the disparity between Amtrak's bid price of \$162,639,724, Defs.' Facts ¶ 198, and the SFRTA's own estimate of only \$81,200,000 to perform the contract, id. ¶ 258. Indeed, Amtrak's own employees thought Amtrak's bid might not be competitive, Temkin Decl., Ex. 5 (June 3, 2008 Deposition Transcript of Thomas Moritz) ("Moritz Dep.") at 60:8-61:5 ("There was concern, general concern that our total cost package might be higher than the competitors' . . ."); see also id., Ex. 8 (December 16, 2008 Deposition Transcript of Nancy Miller) ("Miller Dep.") at 214:12-22 (testifying "that raising the management fee from 10 to 20 percent would have impacted our chances to win the bid in the pricing category"). However, Amtrak has offered expert testimony that refutes the claim that its bid was unreasonable. Defs.' Mem., Rauch Decl., Ex. 50 (Expert Report of Joseph T. Yannuzzi) ("Yannuzzi Rep.") at 7 ("[I]t is my opinion that Amtrak's proposal [*87] contained costs for services that were logical, reasonable, and were accurate estimates of the costs Amtrak would have incurred as the successful bidder."). Amtrak has also suggested that the alternatives to accepting its bid, i.e., re-initiating the procurement process or extending the expiring contract with Herzog, were unfeasible because "the agency [(SFRTA)] and Herzog did not have a good relationship, [and] neither one was interested in pursuing

additional contracts [with each other]." Pl.'s Mot., Orseck Decl., Ex. 16 (Steffensen Dep.) at 55:20-56:1.

In *Iconco v. Jensen Construction Co.*, 622 F.2d 1291, the court was faced with a dispute arising out of a situation in which one company had prevailed over another by submitting a lower-priced bid. *Id.* at 1293-94. The successful bidder subsequently completed the contract before it was discovered that it was not a small business, which if known earlier would have disqualified the company from bidding on the contract. *Id.* at 1294. The disappointed bidder, which had submitted the next lowest bid, filed suit against the successful bidder to recover its lost profits, arguing that it would have been awarded the contract had the defendant [*88] not engaged in its fraudulent behavior. *Id.* at 1294, 1300-01. The disappointed bidder relied on testimony by the procurement officer who stated that if the lowest bidder had been found unqualified to receive the contract, then it would have been awarded to the next lowest bidder whose proposal was reasonably priced. *Id.* at 1300-01. The court concluded that this testimony was sufficient for the jury to conclude that the award would have gone to the disappointed bidder had it not been awarded to the defendant. *Id.* at 1301. Here, although Amtrak's price proposal far exceeded both Veolia's proposal and the SFRTA's own estimation, Defs.' Facts ¶ 203; Pl.'s Supp. Facts ¶ 203, as noted earlier Amtrak's expert testified that "Amtrak's proposal contained costs for services that were logical, reasonable, and were accurate estimates of the costs Amtrak would have incurred" Defs.' Mem., Rauch Decl., Ex. 50 (Yannuzzi Rep.) at 7. Similar to the testimony in *Iconco*, Amtrak's proffer is sufficient to create a question of fact as to the reasonableness of Amtrak's proposed price and whether it would have been rejected despite its amount. See *Iconco*, 622 F.2d at 1300-01.

Even if the Court could [*89] conclude that Amtrak's price was unreasonable, it could not award summary judgment to Veolia on Amtrak's tortious interference claim because a fact-finder could nonetheless reasonably conclude that the SFRTA, under the circumstances it would have confronted, would have nevertheless accepted Amtrak's bid absent any other alternatives. The Court makes this finding because assuming Herzog would not have agreed to extend its contract--an assumption the Court makes in interpreting the facts in the light most favorable to Amtrak--it is not clear whether the SFRTA would have been able to re-start the procurement process in an effort to find alternate bidders, while in the interim continuing to provide services for Southern Florida's commuters. See Pl.'s Opp'n at 32-33. Summary judgment is not a proper tool for addressing this hypothetical question. See *Anderson*, 477 U.S. at 255 ("[T]he drawing of legitimate inferences from the facts are jury functions,

not those of a judge . . . ruling on a motion for summary judgment . . .").

4. Resultant Damages

In support of its damages estimate, including lost profits, Amtrak proffers expert testimony. See Defs.' Facts ¶ 247. Veolia argues, however, that [*90] lost profits in the government contracts context are "speculative per se" and that Amtrak's estimated damages should therefore be rejected. Defs.' Mem. at 43. Amtrak responds that its proposal for the SFRTA contract was a "fixed-price contract," paid in an agreed "amount for each year of the contract," with a "built-in profit margin, over and above Amtrak's expected fixed and indirect costs." Pl.'s Opp'n at 36. Veolia disputes Amtrak's expected-costs theory and points out that Amtrak's unexpected high labor settlement agreement would have reduced any profit Amtrak would have realized. See Defs.' Facts ¶ 243. Amtrak answers that even if Veolia's position has merit, the higher labor costs would have amounted to an unexpected expenditure of the kind that would have entitled Amtrak to renegotiate the Operations Contract with the SFRTA. See Pl.'s Supp. Facts § I ¶ 243.

"[R]esultant damage[s]" are the final element of a claim for tortious interference. *Amtrak I*, 592 F. Supp. 2d at 98 (quoting *Browning*, 292 F.3d at 242). Such damages include "the pecuniary loss of the benefits of the . . . prospective relation . . . [and] consequential losses for which the interference is the legal cause." [*91] *Id.* at 100 (quoting *Restatement (Second) of Torts § 774A*) (alterations in original and internal quotation marks omitted). All damages must be demonstrated with reasonable certainty, *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.*, 957 A.2d 890, 902 (D.C. 2008) (quoting *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543, 549-50 (D.C. 1981)), and they cannot be based on mere speculation or guesswork, *id.*, although mathematical precision is not required, *id.* at 902-03 (quoting *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 329 (D.C. 2001)). Moreover, "where the tort itself . . . preclude[s] the ascertainment of the amount of damages with certainty, . . . a plaintiff seeking to recover lost profits . . . [can] prove . . . the amount of damages . . . based on a reasonable estimate." *Tri County Indus., Inc. v. District of Columbia*, 200 F.3d 836, 841, 339 U.S. App. D.C. 378 (D.C. Cir. 2000) (quoting *Samaritan Inns Inc. v. District of Columbia*, 114 F.3d 1227, 1234-35, 325 U.S. App. D.C. 19 (D.C. Cir. 1997)).

In Tri County, the plaintiffs produced evidence concerning the estimation of its damages based on testimony by eight witnesses, as well as expert testimony and projections of profitability by an economist. *Id.* at 841-42. [*92] The court found that while the estimates might be

"uncertain or inexact," they "were sufficiently well founded to avoid characterization as mere speculation or guess." *Id.* at 841-42 (internal quotation marks and citations omitted). In contrast to what occurred in Tri County, where the defendant did not seriously challenge the plaintiff's estimated damages, *id.* at 841, here, Veolia puts Amtrak's estimate in doubt, as a number of government-sponsored reports have called into question the accuracy of Amtrak's cost-accounting practices, see Defs.' Mem., Rauch Decl., Ex. 47 (October 2005 GAO Report, GAO-06-145) at 6-7 ("Amtrak's knowledge and information systems related to procurement are fragmented and have limited ability to produce useful spending information."), Ex. 48 (April 2006 GAO Report, GAO-06-470) at 22 ("Amtrak officials acknowledged that the methods for assigning its costs are not exact."). Moreover, Veolia notes that Amtrak's profit margin quite likely would have been reduced due to the fact that Amtrak's bid only "included a 9% additive to account for the pending settlements between Amtrak and its labor unions," while the final wage settlements resulted in actual wage increases [*93] of between 18% and 25%. Defs.' Facts ¶ 241. And according to Amtrak's expert, "Amtrak would have had to eat the difference between the actual and the estimated costs." Defs.' Mem., Rauch Decl., Ex. 13 (Miller Dep.) at 121:12-15.

Although this evidence demonstrates that Amtrak's damage estimate might be uncertain or inexact, it is insufficient to show that Amtrak's damages are the product of pure speculation or guesswork. To the contrary, Amtrak has clearly articulated the basis for its estimate, namely, a 9% increase in labor costs, which could be adjusted based on evidence presented at trial, including Veolia's contention that the actual increase was between 18% to 25%. See Defs.' Facts ¶ 241. And, it is for a jury to determine whether inaccuracies in Amtrak's labor cost projections would have denied Amtrak any profit it might have realized, or whether the SFRTA would have renegotiated with Amtrak if it had been awarded the contract.

Regardless of the actual amount Amtrak may ultimately be able to recover, Veolia relies on the proposition that "government contract lost profit damages a[re] speculative per se," Defs.' Mem. at 43, and it cites *Northland Equities, Inc. v. Gateway Center Corp.*, 441 F. Supp. 259, 264 (E.D. Pa. 1977) [*94] and *George D. Newman & Sons, Inc. v. Washington Suburban Sanitary Commission*, 696 F. Supp. 160, 162 (D. Md. 1988) in support of this position, *id.* at 43-44. Neither case, however, has applicability to the case at bar. In *George D. Newman*, the court found that a disappointed bidder was not entitled to an award of any damages based on its "ill-defined" claim, first, because the claim was brought against a state agency that enjoyed sovereign immunity

and, second, because the bidder was not claiming an entitlement to the rejection of its bid, but rather was only seeking the opportunity to rebid on a contract. 696 F. Supp. at 162. Although *Northland Equities* is more on point, it is also distinguishable. There, a disappointed bidder on a government contract attempted to recover its lost profits. 441 F. Supp. at 261. The court found that "[i]t would be improper to award [the] plaintiff lost profits because the contract under which [the] plaintiff arguably would have made such profits never actually came into existence. The solicitation by [the government] was for leasehold offers which it could accept or reject as it pleased." *Id.* at 264. The court then concluded, "[p]ure speculation being [*95] the basis of the claim for lost profits, [the] plaintiff fails to state a common law claim for which relief may be granted." *Id.* at 265. Although like in *Northland Equities*, the SFRTA had the right to "reject any or all [p]roposals," Pl.'s Mot., Orseck Decl., Ex. 8 (RFP) § 1.10.1 at AMTH 003678, Amtrak argues that this was not a realistic course the SFRTA would have taken, Pl.'s Opp'n at 32-33. As noted previously, Amtrak has also, through expert testimony, created a genuine factual dispute as to whether the SFRTA would have accepted its proposal in the event Veolia had not placed a bid, or its bid had been made without associating itself with Amtrak's prior employees. See supra Part III.C.3.b. As the District of Columbia Circuit has observed, "[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person," *Tri County, 200 F.3d at 841* (quoting *Samaritan Inns, 114 F.3d at 1234-35*). Accordingly, the Court cannot agree that a disappointed bidder on a government contract is absolutely barred from recovering lost profits where it [*96] was not awarded a contract due to another bidder's alleged improper conduct. Veolia has, therefore, failed to demonstrate its entitlement to summary judgment based on the fourth element of a tortious interference claim.

For all of the reasons discussed above, Veolia's motion for summary judgment on Count II of Amtrak's Complaint is denied.³⁰

³⁰ Veolia also argues that Amtrak's "factual allegations, in whatever veneer," in support of its lost profits damages claims is an assertion that the "names and credentials of Stencil, Salemme, and Mauck were proprietary business assets of Amtrak" and "that a benefit (the SFRTA Operations contract) was conferred upon Veolia when those credentials were used . . . in the proposal of [its] Key Management Team." Defs.' Mem. at 42. Considered in this light, Veolia contends that both of Amtrak's claims are precluded because

they are claims by a disappointed bidder for unjust enrichment. *Id.* at 42-44 (citing *John C. Holland Enters., Inc. v. J.P. Mascaro & Sons, Inc., 653 F. Supp 1242, 1247 (E.D. Va. 1987)*, *aff'd, 829 F.2d 1120 (4th Cir. 1987)*; *Oceanic Exploration, 2006 U.S. Dist. LEXIS 72231, 2006 WL 2711527, at *21*; *Ellsworth, 917 F. Supp. at 848-49*). Amtrak responds that far from [*97] asserting that it conferred a benefit on Veolia, it is asserting that Veolia "stole the benefit it wanted." Pl.'s Opp'n at 34. Amtrak also refers the Court to the Court's prior decision in this case in which the Court held that Amtrak had sufficiently pleaded the elements of both its tortious interference and aiding and abetting claims. *Id.*

"[U]njust enrichment provides a party with a remedy 'to unwind entanglements' that may have arisen from a failed agreement . . ." *Vila v. Inter-American Inv., Corp., 570 F.3d 274, 280, 386 U.S. App. D.C. 364 (D.C. Cir. 2009)* (citation omitted). "[T]he fundamental characteristic of unjust enrichment is 'that the defendant has been unjustly enriched by receiving something . . . that properly belongs to the plaintiff[, thereby] forcing restoration to the plaintiff.'" *Rapaport v. U.S. Dep't of Treasury, Office of Thrift Supervision, 59 F.3d 212, 217, 313 U.S. App. D.C. 216 (D.C. Cir. 1995)* (quoting *Dobbs, Law of Remedies § 4.1(2)* (2d ed. 1993) (alterations in the original). A claim for unjust enrichment requires proof that "(1) the plaintiff conferred a benefit on the defendant; (2) the defendant retain[ed] the benefit; and (3) under the circumstances, the defendant's retention of the benefit is [*98] unjust." *Vila v. Inter-American Inv., Corp., 536 F. Supp. 2d 41, 51 (D.D.C. 2008)* (quoting *New World Commc'ns, Inc. v. Thompson, 878 A.2d 1218, 1223 (D.C. 2005)*).

In *Ellsworth*, a disappointed bidder failed to satisfy the elements of a claim for unjust enrichment because "nowhere [did] the plaintiffs allege that any benefit ha[d] been conferred on the . . . defendants by the plaintiffs." *917 F. Supp. at 848*. The court added that there had been "no showing that the plaintiffs had any right to the benefit." *Id.* In *Oceanic Exploration*, the court held that plaintiffs, also disappointed bidders, had sufficiently alleged a claim for tortious interference, but failed to state a claim for unjust enrichment because "they . . . failed to allege that they ha[d] conferred a benefit on the defendants." *2006 U.S. Dist. LEXIS 72231, 2006 WL 2711527, at *20-21*. The court added that "a disappointed bidder for a government contract cannot maintain an unjust enrichment cause of action against a successful

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bidder for the value of that contract." 2006 U.S. Dist. LEXIS 72231, [WL] at *21 (citing *Ellsworth*, 917 F. Supp. at 848-49).

Veolia asks the Court to interpret Amtrak's claim for lost profits as one for unjust enrichment and to reject it, and both counts of the [*99] Complaint, for that reason. Defs.' Mem. at 42. The Court agrees that Amtrak fails to state a claim for unjust enrichment, as Amtrak does not allege that it conferred a benefit to Veolia, but rather that the benefit was "stole[n]." Pl.'s Opp'n at 34. This allegation is insufficient reason for the Court to reinterpret Amtrak's claim for damages as one for unjust enrichment. Although Veolia suggests that Amtrak construes its three former employees' credentials as a benefit that was conferred upon Veolia, Defs.' Mem. at 42, the record is devoid of any indication that Amtrak seeks to recover the value of a benefit it conferred to Veolia. As one example of what Amtrak is asserting, it represents that the three employees were fired not for misusing Amtrak's proprietary property, Pl.'s Opp'n at 9, but for engaging in conduct that amounted to "conflict[s] of interest[s]," see Pl.'s Supp. Facts § I ¶ 232.

The court also rejects Veolia's attempt to define every tortious interference claim of the nature alleged here as one for unjust enrichment. While the court in *Ellsworth* dismissed both plaintiffs' unjust enrichment and tortious interference claims, noting that "[a]s discussed . . . in connection [*100] with the plaintiffs' unjust enrichment claim, the plaintiffs do not and cannot allege any expectancy that *Ellsworth Associates* would have received the . . . [c]ontract," 917 F.

Supp. at 850, as this Court pointed out earlier, see supra Part III.C.1, the dismissals of the tortious interference claims in the cases cited by the *Ellsworth* court were based on a failure by disappointed bidders to demonstrate a reasonable likelihood that they would have been awarded contracts, rather than on the theory that such claims were barred for the same reason unjust enrichment claims could not be maintained. See *Ellsworth*, 917 F. Supp. at 850; *Oceanic Exploration*, 2006 U.S. Dist. LEXIS 72231, 2006 WL 2711527, at *20-21 (interpreting *Ellsworth* along same lines). Therefore, *Ellsworth*, and the cases it relies on, do not support Veolia's position.

For all of these reasons, the Court rejects Veolia's contention that Amtrak's claims should be dismissed because they are actually unjust enrichment claims.

IV. Conclusion

To be sure, Amtrak's road to success at trial on both counts of its Complaint will be a significant challenge. Nevertheless, for the reasons outlined above it's a challenge the Court must permit Amtrak to pursue. Accordingly, [*101] Amtrak's motion for partial summary judgment as to Count I is denied and Veolia's motion for summary judgment as to Counts I and II is also denied.

SO ORDERED. ³¹

31 An Order consistent with this Memorandum Opinion was issued on September 30, 2010.

REGGIE B. WALTON

United States District Judge



IN RE: NAZI ERA CASES AGAINST GERMAN DEFENDANTS LITIGATION,
SIMON ROZENKIER, Appellant v. AG SCHERING; BAYER AG

No. 04-3934

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

196 Fed. Appx. 93; 2006 U.S. App. LEXIS 19477

September 26, 2005, Argued
August 2, 2006, Opinion Filed

NOTICE: RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: **[**1]** On Appeal from the United States District Court for the District of New Jersey. (D.C. Civ. No. 03-cv-03413). District Judge: Honorable William G. Bassler.

Rozenkier v. Schering AG (In re Nazi Era Cases Against German Defendants Litig.), 334 F. Supp. 2d 690, 2004 U.S. Dist. LEXIS 18391 (D.N.J., 2004)

COUNSEL: Carey R. D'Avino, Esquire, Stephen A. Whinston, Esquire (Argued), Berger & Montague, P.C., Philadelphia, PA, Counsel for Appellant.

John J. Gibbons, Esquire, Thomas R. Valen, Esquire, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, A Professional Corporation, Newark, NJ.; Roger M. Witten, Esquire (Argued), Wilmer Cutler Pickering Hale and Dorr LLP, New York, Counsel for Appellees.

JUDGES: BEFORE: ALITO, * AMBRO, and LOURIE,
** Circuit Judges

* Then Judge, now Justice, Alito heard oral argument in this case but was elevated to the United States Supreme Court on January 31, 2006. The opinion is filed by a quorum of the panel. 28 U.S.C. § 46(d).

** Honorable Alan D. Lourie, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

OPINION BY: LOURIE

OPINION

[*94] LOURIE, *Circuit Judge*

Simon Rozenkier appeals from the decision of the United States District Court for the District of New Jersey granting Schering AG's and Bayer AG's (the "Appellees") motion to dismiss Rozenkier's **[**2]** complaint for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. *Rozenkier v. Schering AG (In re Nazi Era Cases Against German Defendants Litig.)*, 334 F. Supp. 2d 690 (D.N.J. 2004) ("*Decision*"). Because Rozenkier's claims are nonjusticiable under the political question doctrine, we affirm.

I. BACKGROUND

This case arises from the horrific, widespread crimes perpetrated by the Nazi government during World War II. Rozenkier, a Holocaust survivor, was subjected to inhumane Nazi medical experimentation while he was imprisoned at the Auschwitz-Birkenau concentration camps. *Decision*, 334 F. Supp. 2d at 691. During his internment in 1944, he was forced to undergo injections of unknown chemical substances into his testicles causing swelling and bleeding of his genitalia. *Id.* After his liberation from Auschwitz-Birkenau, Rozenkier emigrated from Poland to the United States. *Id.* In 1952, he married but was unable to have children. *Id.* The cause of his sterility remained unknown until 1999, when Rozenkier learned definitively that his "infertility was the result of a Nazi 'medical experiment. **[**3]** "" *Id.*

Rozenkier's case does not arise in isolation. In the late 1990's, Holocaust survivors filed a number of class

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action lawsuits seeking compensation from German [*95] corporations who allegedly participated in Nazi-era crimes arising from slave and forced labor during World War II. In 1998, at the request of the German government, the United States government agreed to facilitate the resolution of those lawsuits. Following the personal involvement of the President of the United States and German Chancellor Schroeder, the federal governments of the United States and Germany, German corporations, and attorneys for various plaintiffs agreed that the plaintiffs would voluntarily dismiss their lawsuits in exchange for the creation of the German Foundation "Remembrance, Responsibility and the Future" (the "Foundation"), which would make payments to Nazi victims from a DM 10 billion pool.

On July 17, 2000, the United States and German governments signed an agreement (the "Joint Statement") expressing their support for the Foundation. Joint Statement, at 3. Concurrently, the two governments signed an executive agreement (the "Executive Agreement") recognizing the desire of the two governments [**4] for an "all embracing and enduring legal peace to advance their foreign policy interests" and reflecting their commitments to the Foundation as "the *exclusive remedy and forum* for the resolution of . . . *all claims that have been or may be asserted* against German companies arising from the National Socialist era and World War II," Executive Agreement, Art. 1(1) (emphasis added), including specifically medical experimentation claims. *Id.* at Annex A, P4. The Executive Agreement also stated that the "United States shall . . . inform its courts through a Statement of Interest . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolution" of those claims. *Id.* at Art. 2(1). Specifically, the Executive Agreement provided:

[T]he United States will timely file a Statement of Interest and accompanying foreign policy statement of the Secretary of State and Declaration of Deputy Treasury Secretary Stuart E. Eizenstat in all pending and future cases, regardless of whether the plaintiff(s) consent(s) to dismissal, in which the United States is notified that a claim has been asserted against [**5] German companies arising from the National Socialist era and World War II.

Id. at Annex B, at 1.

On August 12, 2000, after the Joint Statement and Executive Agreement were executed, the German gov-

ernment enacted laws for implementing the Foundation ("Foundation Law"). The Foundation Law allocated DM 50 million for the compensation of "other personal injuries," including injuries to victims of medical experimentation, and capped individual awards for those injuries at DM 15,000. Foundation Law, at §§ 9(1), 9(3). In a series of letters from the lead German negotiator, Otto Graf Lambsdorff, to the lead United States negotiator, Stuart Eizenstat, the German government reaffirmed that the "DM 50 million allocation [for other personal injury] will be distributed to each partner organization so that each approved applicant is provided a pro-rata amount of the total amount of all approved 'other personal injury' applicants" and that the "Foundation will give victims of medical experimentation and Kinderheim cases priority over other non-labor personal injury wrongs." Letter from Lambsdorff to Eizenstat, July 11, 2000. On October 19, 2000, the United States and Germany exchanged [**6] diplomatic notes declaring the Foundation Law, as clarified by the Lambsdorff-Eizenstat letters, to be "fully consistent" with the Executive Agreement, causing the Executive Agreement to enter into force as of that date. Exchange of Notes between the Embassy of the United [*96] States and the Federal Foreign Office of Germany, Oct. 19, 2000.

In March 2001, Rozenkier applied for compensation from the Foundation for his injuries. In submitting his application, Rozenkier executed a waiver against "all German companies for claims in connection to National Socialist injustices." The Foundation approved Rozenkier's application by letter dated February 6, 2004, and issued him two compensation checks for \$ 4,645.09 and \$ 5,348.36. Decision, 334 F. Supp. 2d at 694.

Notwithstanding his Foundation application, Rozenkier filed suit in the Eastern District of New York against Schering AG and Bayer AG (the "Appellees") on March 25, 2003, alleging that the Appellees had cooperated with the Nazi regime in causing his sterilization, and claiming damages under a number of tort theories, including negligence, infliction of emotional distress, assault and battery, conspiracy, fraud, and breach [**7] of the manufacturer's duty to warn, as well as violations of international law. Rozenkier also alleged that the waiver he had submitted with his Foundation application was void because the Foundation had unilaterally altered the compensation scheme and eliminated the right to file an appeal with the Independent Appeals Authority. In August 2003, the Judicial Panel on Multidistrict Litigation transferred the action to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1407, on the ground that the case raised common questions of fact with 35 previously transferred Nazi-era cases filed by American plaintiffs against German corporations.

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The Appellees moved to dismiss Rozenkier's complaint for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*, and the United States filed a statement of interest (the "Statement of Interest") recommending that the action be dismissed. On September 10, 2004, the district court granted the Appellees' motion, holding that Rozenkier's claims presented a nonjusticiable political question. The court explained that if it were to adjudicate [**8] the merits of the complaint, it would be acting against the recommendation of the Executive Branch on an issue of foreign policy. The court thus concluded that Rozenkier's claims were nonjusticiable and that the proper forum for restitution or compensation was the Foundation. In a footnote, the court remarked that it did not need to address Rozenkier's allegations concerning the Foundation's compensation scheme and the right of appeal in detail because those allegations did not involve acts by the Appellants. Finally, the court did not address whether Rozenkier's claim was nonjusticiable on the grounds of the act of state doctrine or international comity. Rozenkier timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

II. DISCUSSION

Our review of a dismissal under *Federal Rule of Civil Procedure 12(b)(6)* on the basis of the political question doctrine is plenary. *State of New Jersey v. United States*, 91 F.3d 463, 466 (3d Cir. 1996).

On appeal, Rozenkier argues that the political question doctrine does not apply to this case because his claims neither threaten the operation of [**9] the Foundation nor implicate the conduct of the United States or the post-war German government. According to Rozenkier, the foreign policy interest of the United States was the creation of the Foundation, and that interest has been fulfilled. Rozenkier also asserts that the German Parliament ("Bundestag") unilaterally altered the compensation calculation for victims of medical experiments to be *per capita* payments [**97] rather than a *pro rata* distribution; he contends that because the United States did not get what it bargained for in the Executive Agreement, no foreign policy interest exists that would require dismissal of his action.

The Appellees respond that the political question doctrine applies to this case. According to Appellees, adjudicating this case would require United States courts to second-guess 60 years of exclusive intergovernmental resolution of Nazi-era claims, and in particular, the United States foreign policy decision articulated in the Statement of Interest that the Foundation should be the exclusive forum for resolution of the claims of Rozenkier and similarly situated individuals. Appellees also contend that the additional defenses of the act of state [**10]

doctrine and international comity require dismissal as well.

We agree with the Appellees that the district court correctly dismissed Rozenkier's claims as raising a nonjusticiable political question. The political question doctrine is a judicially created theory that limits the power of the federal courts to adjudicate certain types of claims. The "nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). As the Supreme Court held in the landmark case of *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), certain political issues are left to the executive, whose decisions on those matters are conclusive:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, [**11] no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

Id. at 165-66. Thus, "[w]hen a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of that issue." *Department of Commerce v. Montana*, 503 U.S. 442, 457-58, 112 S. Ct. 1415, 118 L. Ed. 2d 87 (1992).

In *Baker*, the Supreme Court in *dictum* addressed political questions involving foreign relations, noting that judicial scrutiny of foreign relations decisions involves a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." 369 U.S. at 211-12. While cautioning that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," the Supreme Court identified six factors, any one of which indicates the presence [**12] of a nonjusticiable political question:

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Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence [*98] to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 211, 217. Here, we conclude that Rozenkier's claims present a nonjusticiable political question because the fourth *Baker* factor is clearly implicated: the adjudication of Nazi-era claims by United States federal courts would express a lack of respect for the Executive Branch because of the Executive Branch's longstanding foreign policy interest that issues [**13] relating to World War II and Nazi-era claims be resolved through intergovernmental negotiation.

As the Executive Agreement notes, the United States and German governments worked for 55 years to address the consequences of the National Socialist era and World War II through political and governmental acts between the two governments, and "the Agreement and the establishment of the Foundation represent a fulfillment of these efforts." Executive Agreement, at 4. The first intergovernmental agreement to address Nazi-era wrongdoing by the German government and German companies was the 1945 Potsdam Agreement, in which the United States, Great Britain, and the Soviet Union agreed to remove German industrial assets as war reparations. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 403, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003). That policy continued with the Paris Agreement, which provided that the signatory nations would share the seized German assets as settlement of "all [their] claims and those of [their] nationals against the former [German] Government and its Agencies, of a governmental or private nature, arising out of the war." *Id.* (quoting the Paris Agreement). The [**14] effect of the Paris Agreement was curtailed, however, and attention to reparations intentionally deferred, when the western Allies moved to end their occupation and reestablish a sovereign Germany as a buffer against Soviet expansion. Concerned that

continued reparations would cripple the new Federal Republic of Germany economically, the Allies decided in the 1953 London Debt Agreement to put off "[c]onsideration of claims arising out of the second World War by countries which were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich. . . until the final settlement of the problem of reparation." *Id.* at 403-04 (quoting the Agreement on German External Debts). Those terms were construed by German courts as postponing the resolution of foreign claims against both the German government and German industry until the terms of an ultimate postwar treaty were resolved. *See id.* at 405.

In the meantime, the Allies assigned the responsibility of providing restitution to victims of Nazi persecution to the new German government. *See id.* (citing the Convention of the Settlement [**15] of Matters Arising Out of the War and the Occupation, May 26, 1952). Pursuant to this treaty obligation, Germany enacted domestic legislation and entered into a number of bilateral agreements with other nations and non-governmental organizations. *See id.* By 2000, Germany had paid more than DM 100 billion in compensation to Nazi-era victims. *See id.* A number of victims, however, have attempted to pursue litigation in United States courts. Those suits generated much protest by the defendant companies and the German government, to the point that the United States government took action to try to resolve "the last great compensation related negotiation arising out of World War II." *Garamendi*, 539 U.S. at 405 (quoting a press briefing by Deputy Secretary of [*99] Treasury Eizenstat). The ensuing negotiations at the intergovernmental level culminated in the creation of the Foundation and the signing of the Executive Agreement. *See id.*

The history of the Foundation and the Executive Agreement make clear that the Executive and Legislative branches have exclusively managed the resolution of Nazi-era reparations claims for 55 years. The longstanding history of negotiations [**16] at the intergovernmental level represents a foreign policy interest that Nazi-era claims be resolved through the political branch. Here, we are mindful of the Supreme Court's emphasis on preserving the "capacity of the President to speak for the Nation with one voice in dealing with other governments' to resolve claims . . . arising out of World War II." *Garamendi*, 539 U.S. at 424.

In *Garamendi*, the Supreme Court discussed the same set of agreements for Holocaust compensation that are at issue here, holding that California's Holocaust Victim Insurance Relief Act (HVIRA), and in particular a provision of the HVIRA requiring any insurer that did business in California and that sold insurance policies in Europe which were in effect during the Holocaust-era to

disclose certain information about those policies to the California Insurance Commissioner or risk losing its license, impermissibly interfered with the Executive Branch's foreign policy, and was preempted on that basis. *Id.*, 539 U.S. at 421. The Court observed:

[R]esolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's [**17] responsibility for foreign affairs. Since claims remaining in the aftermath of hostilities may be "sources of friction" acting as an "impediment to resumption of friendly relations" between the countries involved, there is a "longstanding practice" of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries. The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War. Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed.

Id. at 420-21. Although *Garamendi* was not a political question case, the same reasoning applies here. The Executive Branch engaged in a decades-long [**18] negotiation with the German government to resolve Nazi-era reparations claims. That process culminated with the signing of the Executive Agreement, which enunciated a foreign policy that the Foundation be the exclusive forum for claims by Nazi-era victims of medical experimentation against German companies. The Statement of Interest confirms that understanding. In this context, judicial review of Rozenkier's claims would express a lack of respect for the Executive Branch's longstanding foreign policy interest in resolving Nazi-era claims through intergovernmental negotiation. We therefore conclude that his case presents a nonjusticiable political question that requires dismissal.

We reject Rozenkier's argument that United States foreign policy interests were limited to the act of "creat-

ing" the Foundation. [*100] As discussed, the Executive Branch has expressed a longstanding foreign policy interest in resolving Nazi-era claims at the intergovernmental level, and that interest did not terminate with the creation of the Foundation. Indeed, the Statement of Interest provides that, four years *after* the creation of the Foundation, the "United States maintains [the] policy in the current [**19] administration" that "all asserted claims should be pursued through the Foundation instead of the courts." Statement of Interest, at 11.

In so holding, we reach the same result as the Second Circuit and New Jersey district courts that have dismissed claims arising out of the Nazi-era on political question grounds. *See Whiteman v. Dorotheum GmbH & Co.KG*, 431 F.3d 57 (2d Cir. 2005) (affirming the dismissal of Nazi-era claims against Austria on political question grounds); *Frumkin v. JA Jones, Inc. (In re Nazi Era Cases Against German Defendants Litig.)*, 129 F. Supp. 2d 370, 383 (D.N.J. 2001) (dismissing on political question and international comity grounds); *Burger v. Fischerv. DeGussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing on political question grounds); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (dismissing on political question and international comity grounds).

In *Whiteman*, the Second Circuit dismissed a putative class action against Austria for Nazi-era wrongdoing as a nonjusticiable political question. 431 F.3d at 59-60. The court held:

We conclude that we cannot "undertak[e] independent [**20] resolution without expressing lack of respect due" the Executive Branch because (1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of the claims in question; (2) the United States Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated that, as a matter of foreign policy, the alternative forum is superior to litigation; and (3) the United States foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of this case.

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Id. at 73-74 (quoting *Baker*, 369 U.S. at 217). The Second Circuit's analysis is thus consistent with our holding that the claims of Rozenkier and similarly situated individuals present a nonjusticiable political question. We note, however, that our conclusion rests not only on the foreign policy interests expressed in the Executive Agreement and the Statement of Interest, but also on the United States' long-standing foreign policy commitment to resolving reparations claims arising out of World War II and the Holocaust [**21] at the governmental level.

We are aware that the Ninth Circuit has rendered a decision in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), in which it arrived at the same conclusion that we do concerning slave labor claims against the Vatican Bank, but not with regard to property claims against the Vatican Bank. In *Alperin*, Holocaust survivors asserted property claims alleging that the Vatican Bank had profited from looted assets and slave labor during the Croatian Ustasha political regime, which was supported throughout World War II by Nazi forces. The Holocaust survivors also asserted slave labor claims alleging that the Vatican Bank had actively assisted the war objectives of the Ustasha Regime in violation of international law. The Ninth Circuit allowed the property claims to proceed, but noted that the case was "distinguishable from those involving the Foundation in that there is *no analogous executive agreement* covering claims to the Ustasha treasury." [*101] *Id.* at 550 (emphasis added) (referring to *Decision*, 334 F. Supp. 2d at 696-97). Thus, *Alperin* is not persuasive to the resolution of this case involving the Foundation. [**22] However, the court held that the slave labor claims were nonjusticiable because they raised a political question. *Id.* at 562. Thus, the holding of *Alperin* in its analysis of the slave labor claims is consistent with our resolution here concerning tort claims.

Finally, we respectfully find the Eleventh Circuit's reasoning in *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004), to be unpersuasive. In that case, the Eleventh Circuit declined to dismiss a Holocaust-related claim against German banks based on the political doctrine, instead dismissing the claim on the grounds of international comity. 379 F.3d at 1236, 1239. The court reasoned that because the Executive Agreement, which is the same as that at issue here, stated that it did not provide an independent legal basis for dismissal, the "President has purposely chosen not to settle [the] claims directly" and therefore adjudication of the claims does not "interfere with American foreign relations." *Id.* at 1237, 1236.

We disagree with the Eleventh Circuit's interpretation of the Executive Agreement. The provision in the Executive Agreement that the court relied [**23] on for its holding that the political question doctrine was inapplicable is set forth in the section entitled "Elements of

U.S. Government Statement of Interest," and provides: "The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground." Executive Agreement, Annex B, P7.

However, that language does not preclude United States federal courts from dismissing claims arising under the Executive Agreement as raising a nonjusticiable political question. Indeed, in its Statement of Interest in this case, the United States recommends dismissal based on foreign policy interests. Thus, while the United States has not asserted that the foreign policy interests expressed in the Executive Agreement and the Statement of Interest¹ provide an independent legal basis for dismissal, such interests are especially compelling here, and the United States government's long-standing foreign policy commitment to resolving reparations claims arising out of World War II and the Holocaust at the governmental level, coupled [**24] with the more recent creation of the Foundation, the signing of the Executive [*102] Agreement, and the filing of the Statement of Interest in this case, together provide such a basis.

¹ The Executive Agreement states that "it would be in the foreign policy interests of the United States to be the exclusive remedy and forum for resolving . . . claims asserted against German companies . . . and that dismissal of such cases would be in its foreign policy interest." Executive Agreement, Art. 2(1). The Executive Agreement also explains that the foreign policy interest at issue was resolving Nazi-era cases outside of litigation and creating an all-embracing and enduring peace. Executive Agreement, at 3. Further, the Statement of Interest asserts that [t]he President of the United States concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the Nazi era and World War II, including without limitation those relating to compensation for slave and forced labor, "aryanization" or other confiscation of, damage to, or loss of property (including banking assets and insurance policies), subjection to medical experimentation, placement in children's homes, and other cases of personal injury. Statement of Interest, at 11 (citing Letter of President Clinton to Chancellor Schroeder, Dec. 13, 1999).

[**25] Because we conclude that the claims of Rozenkier and similarly situated individuals present a nonjusticiable political question, we do not address whether

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the act of state doctrine and international comity are alternative grounds for dismissal. In addition, we have considered Rozenkier's remaining arguments and find them unpersuasive or unnecessary for our decision. Because Rozenkier's claims present a nonjusticiable political question, we affirm the district court's judgment

granting the Appellees' motion to dismiss Rozenkier's complaint.

III. CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.



**BRENDA P. SMITH, Plaintiff, v. WORLD SAVINGS AND LOAN ASSOCIATION,
dba WORLD SAVINGS BANK; WELLS FARGO BANK, N.A.; SETON CAPITAL
GROUP, INC.; and DOES 1 through 50, inclusive, Defendants.**

Case No. 2:10-CV-02855 JAM-JFM

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CAL-
IFORNIA**

2011 U.S. Dist. LEXIS 11576

**January 28, 2011, Decided
January 31, 2011, Filed**

SUBSEQUENT HISTORY: Costs and fees proceeding at *Smith v. World S&L Ass'n*, 2011 U.S. Dist. LEXIS 55852 (E.D. Cal., May 11, 2011)

L.R. 230(g). The hearing was scheduled for January 12, 2011.

COUNSEL: [*1] For Brenda P Smith, Plaintiff: John Steve Sargetis, United Law Center, Roseville, CA.

For Wells Fargo Bank, N.A., Defendant: Jeremy E. Shulman, Anglin Flewelling Rasmussen, Campbell & Trytten, LLP, Pasadena, CA.

JUDGES: JOHN A. MENDEZ, UNITED STATES DISTRICT JUDGE.

OPINION BY: JOHN A. MENDEZ

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on Defendant Wachovia Mortgage's ("Defendant") Motion to Dismiss (Doc. #4) and its Motion to Strike Portions of Plaintiff's Complaint (Doc. #5). Defendant, a division of Wells Fargo Bank, N.A., was formerly known as Wachovia Mortgage, FSB, which was formerly known as World Savings Bank, FSB. Defendant asks the Court to dismiss the Complaint (Doc. #1) filed by Plaintiff Brenda P. Smith ("Plaintiff"). Plaintiff opposes the motions.¹

¹ These motions were determined to be suitable for decision without oral argument. *E.D. Cal.*

I. FACTUAL AND PROCEDURAL BACKGROUND

The Complaint centers on allegations involving Plaintiff's broker, and brother-in-law, Brandon Caffrey ("Caffrey"). Plaintiff alleges that in or around March 2006, Caffrey offered to get her the best loan possible to refinance her [*2] house in Rancho Murieta. Plaintiff avers that Caffrey indicated he could get Plaintiff a loan for \$469,000 even though her monthly income was only \$900. Plaintiff claims that Caffrey overstated her income by approximately \$4,000 without her knowledge and that he knew her monthly payments would start at \$1,721 and would increase after the first year. Plaintiff alleges that she did not understand the loan documents, the terms of the loan were not fully explained to her, and she believed the loan would be affordable.

Plaintiff does not make any specific claims involving the Defendant other than a generalized theory alleging predatory lending and foreclosure fraud. Plaintiff theorizes that mortgage lenders loan money to people unable to afford the loans with the intent to profit from the sale and servicing of the loans.

Plaintiff filed a complaint in the Superior Court of California, Sacramento, alleging eleven causes of action: (1) Fraud; (2) Constructive fraud; (3) Conspiracy to defraud; (4) Negligence; (5) Unlawful/unfair business practices, violation of California Business & Professions Code ("UCL") § 17200 *et seq.*; (6) Failure to explore foreclosure avoidance, violation of *California Civil Code* § 2923.5; [*3] (7) Wrongful foreclosure, violation of

2011 U.S. Dist. LEXIS 11576, *

California Civil Code § 2924; (8) Violation of Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, et seq.; (9) Violation of Real Estate Procedures Settlement Act ("RESPA"), 12 U.S.C. § 2601, et seq.; (10) Restitution and Rescission; (11) Declaratory and Injunctive Relief. The case was removed to this Court on October 22, 2010.²

2 Most of the specific allegations in the Complaint focus on Plaintiff's broker rather than Defendant. A "financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Federal Savings & Loan Ass'n*, 231 Cal. App. 3d 1089, 1096, 283 Cal. Rptr. 53 (Cal. Ct. App. 3d 1991). Thus, in the absence of any allegations that Defendant's role in this transaction was anything other than as a lender of money it appears that Plaintiff's claims lie against her broker and not Defendant.

II. OPINION

A. Legal Standard

1. Motion to Dismiss

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to *Federal Rule of Civil Procedure section 12(b)(6)*. In considering a motion to dismiss, the [*4] court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1975), overruled on other grounds by *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984); *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the complaint pursuant to *Federal Rule of Civil Procedure § 15(a)*. "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . .

that the complaint could not be saved by amendment." *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

2. [*5] Motion to Strike

"Rule 12(f) provides in pertinent part that the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter . . . Motions to strike are disfavored and infrequently granted. A motion to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation."

Bassett v. Ruggles et al., 2009 U.S. Dist. LEXIS 83349, 2009 WL 2982895 at *24(E.D. Cal. Sept. 14, 2009)(internal citations omitted).

B. Claims for Relief

Defendant argues that the Complaint should be dismissed because several claims are time-barred; preempted by the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 et seq.; the agency allegations are insufficient to impose liability on Defendant; Defendant owed Plaintiff no legal duty; and that the Complaint fails to state an actionable claim. Plaintiff counters that her claims are timely; Defendant owed her a duty to provide a loan she could afford; and that the Complaint was sufficiently pled. For the reasons discussed below, the Complaint is dismissed with prejudice.

1. Time-Barred Claims

Defendant argues that since Plaintiff obtained a loan from [*6] Wachovia in July 2005, any claims with a five-year or less limitations period must fail.³ For the reasons discussed below, Claims 1, 2, 3, 4, 5, 8, and 9 are time-barred and dismissed with prejudice.⁴

3 Though Plaintiff pleads that the loan was obtained in or around March 2006, the Court notes that the loan document (Exh. A, Doc. #8) contains the date July 13, 2005. Since Plaintiff has not contested the authenticity of Exhibit A, the Court will use the July 13, 2005 date in its analysis.

4 The Court notes that in addition to being time-barred, Claims 1, 2, 3, 4, and 5 are also preempted by the Home Owners Loan Act. See 12 U.S.C. § 1461, et seq (preempts state law claims purport-

ing to address the subject of the operations of a federal savings association).

a. Fraud-Based Claims (Claims 1-3)

Claims 1-3 are all fraud-based claims. Actions for relief on the ground of fraud or mistake are governed by a three year statute of limitations. See C.C.P. § 338(d). Defendant argues that since the loan documents were signed in July 2005, Plaintiff was required to bring the Complaint by July 2008; the Complaint was filed on September 16, 2010 and the claims are thus, time-barred. Plaintiff counters that [*7] the statute of limitations should have started running when she became aware of facts constituting the fraud; Plaintiff does not allege when that occurred.

The failure to make the required disclosures occurs, if at all, at the time the loan documents were signed. *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th Cir. 2003). Since the loan agreement was entered into more than five years prior to the filing of this action, the statute of limitations has expired and Claims 1-3 are time barred.⁵ Accordingly, Defendant's Motion to Dismiss Claims 1-3 is GRANTED WITH PREJUDICE.

5 Additionally, the Court finds Defendant's argument that Plaintiff failed to plead the fraud claims in compliance with *Fed. R. Civ. P. 9(b)* to be meritorious.

b. Negligence (Claim 4)

Negligence claims fall under a two-year statute of limitations. C.C.P. § 339(1). Thus, the negligence claim is time-barred and Defendant's Motion to Dismiss Claim 4 is GRANTED WITH PREJUDICE.

c. Violation of the UCL § 17200 (Claim 5)

Claims brought under the UCL must be commenced within four years after the cause of action accrued. *Cal. Bus. & Prof. Code § 17208*. Thus, because the Complaint was filed more than four years after the loan [*8] documents were signed, Defendant's Motion to Dismiss Claim 5 is GRANTED WITH PREJUDICE.

d. Violation of Truth in Lending Act (Claim 8)

Plaintiff alleges that she has a right to rescind the loan contract under the Truth in Lending Act ("TILA"), 15 U.S.C. 1635; she has the ability to cancel the loan under 15 U.S.C. § 1635(a); and she is entitled to a remedy of damages because Plaintiff alleges that Defendant failed to comply with TILA disclosure requirements under 15 U.S.C. § 1640. However, as Defendant points out, Plaintiff's claims are time-barred. Plaintiff does not respond to Defendant's arguments.

Plaintiff does not allege any facts to suggest that the documents contained any misrepresentations or lacked proper disclosures. The Complaint alleges that Caffrey, Plaintiff's broker, did not adequately explain the terms of the loan and that Plaintiff did not understand the loan documents; the Complaint does not claim Defendant violated TILA's disclosure requirements. Despite Plaintiff's assertions, "there is no fiduciary relationship between the borrower and lender." *Oaks Management Corporation v. Superior Court* 145 Cal.App.4th 453, 466, 51 Cal. Rptr. 3d 561 (2006). Thus, Defendant is not responsible for Caffrey's [*9] purported actions and does not owe Plaintiff a duty beyond complying with TILA's regulations.

Even if Plaintiff had properly pled violations of TILA, those claims are barred by the statute of limitations. Plaintiff's right of rescission expired three years after the date of consummation of the transaction. 15 U.S.C. § 1635(f). The right to cancel the loan expired on midnight of the third business day following the consummation of the loan documents. 15 U.S.C. § 1635(a). Finally, the ability to receive damages expired within one year of the occurrence of the TILA violation. 15 U.S.C. 1640(e). Therefore, Plaintiff's TILA claim is time-barred and Defendant's Motion to Dismiss Claim 8 is GRANTED WITH PREJUDICE.

e. RESPA (Claim 9)

Plaintiff alleges that Defendant violated RESPA, 12 U.S.C. § 2607, by engaging in "kickbacks" and "referral fees". The Ninth Circuit has ruled that payment of a yield spread premium, a lump sum paid by a lender to a broker at closing when the loan originated by the broker bears an above-par interest rate, is not automatically a violation of RESPA. *Schuetz v. Banc One Mortgage Co.*, 292 F.3d 1004 (9th Cir. 2002). In addition to failing to articulate a statutory violation, [*10] the RESPA claim is governed by a one year statute of limitations. 12 U.S.C. § 2614. Therefore, Plaintiff's claim is time-barred and Defendant's Motion to Dismiss Claim 9 is GRANTED WITH PREJUDICE.

2. Foreclosure Avoidance and Wrongful Foreclosure (Claims 6 & 7)

Plaintiff's two foreclosure-related claims are moot because the Notice of Default was rescinded and the foreclosure was not completed. Without a foreclosure, Plaintiff cannot plead foreclosure avoidance or wrongful foreclosure. *Foster v. SCME Mortgage Bankers, Inc.*, No. CIV 2:10-518, 2010 U.S. Dist. LEXIS 44648, 2010 WL 1408108, at *4 (E.D.Cal. Apr. 7, 2010). Accordingly, Defendant's Motion to Dismiss Claims 6 and 7 are GRANTED WITH PREJUDICE.

3. Restitution and Rescission (Claim 10)

Plaintiff seeks restitution and rescission. Defendant argues that restitution and rescission are remedies, not separate causes of action; Plaintiff has not offered to tender the loan proceeds and therefore cannot rescind the loan without paying back the debt; and the claim is preempted by HOLA. Plaintiff does not oppose Defendant's arguments.

For Plaintiff's claim to succeed, she must be able to plead ability to tender. "Under California law, '[i]n obtaining rescission or cancellation, [*11] the rule is that the complainant is required to do equity, as a condition to [her] obtaining relief, by restoring to the defendant everything of value which the plaintiff has received in the transaction.'" *Davidson v. Countrywide Home Loans Inc.*, No. 09-CV-2694, 2010 U.S. Dist. LEXIS 74406, 2010 WL 2925440, *3 (S.D. Cal. July 23, 2010), citing *Fleming v. Kagan*, 189 Cal.App.2d 791, 11 Cal. Rptr. 737 (Cal.App.2d. 1961). In addition to failing to plead ability to tender, this claim fails because it is preempted by HOLA. *Curcio v. Wachovia Mortgage Corp.*, No. 09-CV-1498-IEG, 2009 U.S. Dist. LEXIS 96155, 2009 WL 3320499, *4-6 (S.D. Cal. Oct. 14, 2009). Therefore, because Plaintiff cannot tender the loan and because Plaintiff's claim is preempted by HOLA, Defendant's Motion to Dismiss Claim 10 is GRANTED WITH PREJUDICE.

4. Declaratory and Injunctive Relief (Claim 11)

Plaintiff asks for declaratory and injunctive relief. However, as Defendant points out, injunctive relief and declaratory relief are remedies, not causes of action. *Marlin v. AIMCO Venezia, LLC*, 154 Cal.App.4th 154, 162, 64 Cal. Rptr. 3d 488 (Cal. App. 2d. 2007); *General of America Insurance Co. v. Lilly*, 258 Cal.App.2d 465, 470, 65 Cal. Rptr. 750 (Cal.App.2d. 1968).

Moreover, the injunctive relief must be denied because Plaintiff does not show [*12] a reasonable probability of success. "[W]here there is no showing of reasonable probability of success, even though the foreclo-

sure will create irreparable harm, because there is no justification in delaying that harm where, although irreparable, it is also inevitable." *Jessen v. Keystone Savings & Loan Ass'n.*, 142 Cal. App. 3d 454, 459, 191 Cal. Rptr. 104 (Cal. App. 4d. 1983). Additionally, Plaintiff has not stated the nature of the declaration sought. Declaratory relief "must be based on an actual controversy with known parameters. If the parameters are as yet unknown, the controversy is not yet ripe for declaratory relief." *Sanctity of Human Life Network v. Cal. Highway Patrol*, 105 Cal.App.4th 858, 872, 129 Cal. Rptr. 2d 708 (2009). Plaintiff's failure to articulate the parameters for relief makes this claim a repetition of the prior claims alleged in the Complaint. Accordingly, Defendant's Motion to Dismiss Claim 11 is GRANTED WITH PREJUDICE.

5. Motion to Strike

Defendant argues that the Court should strike several paragraphs in the Complaint requesting attorney fees and damages because Plaintiff has not properly pled the necessary facts to obtain attorney fees or punitive damages. Plaintiff, without citing any authority, asks [*13] the Court not to strike its requests for attorney fees or punitive damages. Since the Court has dismissed all of Plaintiff's claims, the Motion to Strike is moot.

III. ORDER

For the reasons set forth above,

Defendant's Motion to Dismiss is GRANTED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: January 28, 2011

/s/ John A. Mendez

JOHN A. MENDEZ,

UNITED STATES DISTRICT JUDGE