UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPORT-IMPORT BANK OF THE UNITED STATES,	:	
Plaintiff,	:	
-against-	:	Civil Action No. 03-8554 (DCP)
ASIA PULP & PAPER CO., LTD., PT INDAH KIAT PULP & PAPER TBK, PT PABRIK KERTAS TJIWI KIMIA TBK, AND PT PINDO DELI PULP AND PAPER MILLS,	:	
Defendants.	:	

[Plaintiff's motion for summary judgment granted.]

Dated: February 6, 2008

Michael J. Garcia, United States Attorney for the Southern District of New York, Sarah E. Light, Assistant United States Attorney, Nicole Gueron, Assistant United States Attorney, for Export-Import Bank of the United States, Plaintiff.

Schnader Harrison Segal & Lewis LLP (Kenneth R. Puhala, Benjamin P. Deutsch, Matthew S. Tamasco, Erin Cowan) for PT Indah Kiat Pulp and Paper TBK, PT Pabrik Kertas Tjiwi Kimia TBK, PT Pindo Deli Pulp and Paper Mills, and Asia Pulp & Paper Co., Ltd., Defendants.

OPINION

POGUE, Judge[1]: This case is about loans guaranteed by the Export-Import Bank of the United States ("Ex-Im"), for defendant subsidiaries of the Asian Pulp and Paper company ("APP"), PT Pabrik Kertas Tjiwi Kimia Tbk ("Tjiwi Kimia"), PT Pindo Deli Pulp

[1]Judge Donald C. Pogue of the United States Court of International Trade, sitting by designation.

& Paper Mills ("Pindo Deli"), and PT Indah Kiat Pulp and Paper ("Indah Kiat"), known collectively in this proceeding as the "Principal Indonesian Operating Companies" ("PIOCs").

Ex-Im is a government agency charged with increasing exports from the United States by providing loans and loan guarantees to would-be importers of products produced in the United States. APP is an Indonesian company and one of the largest paper producers in the world. As explained more fully below, APP and its subsidiaries were beneficiaries of Ex-Im loans and loan guarantees.

Claiming that Defendants have defaulted on the loans that the Ex-Im made or guaranteed, Plaintiff moves for summary judgment against APP, in the amount of $107,640,070.92, principal plus interest accrued as of June 30, 2005, plus further interest and costs, and against the PIOCs for $104,344,903.60 in principal plus interest and further costs. APP asserts the affirmative defenses of estoppel, waiver, ratification, laches, and recoupment. The PIOCs assert the affirmative defenses of estoppel, waiver, ratification, laches, and recoupment, and impossibility.

Jurisdiction

Ex-Im brings this case under the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. §§ 3001-3308 which provides exclusive civil procedures for the United States to recover

judgment on a debt. Accordingly, jurisdiction in this court is based on 28 U.S.C. § 1345. Venue is established under 28 U.S.C. § 1391(b)(2) & (d).[2]

Applicable Standard

The court will grant summary judgment only if Ex-Im can establish by undisputed facts, supported by admissible evidence, that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In making such a demonstration, as the moving party, Plaintiff has the burden of showing that no genuine factual dispute exists. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 (1970). When determining whether a genuine issue of material fact exists, the Court "is to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." Patterson v. County of Oneida, 375 F.3d 206, 219 (2d Cir.2004); see also LaFond v. Gen. Physics Serv. Corp., 50 F.3d 165, 171 (2d Cir.1995).

For questions of law, in accordance with the parties' loan agreements, New York law, applies.

Facts

It is undisputed that APP, in its role as the parent of the

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[2]The PIOCs have also asserted defenses of lack of personal jurisdiction and insufficient service of process. We reject these claims, however, because the PIOCs, like APP, agreed to jurisdiction in a valid forum-selection clause and because, as already established by Magistrate Judge Francis, the claim of insufficient service is without merit. Light Decl., Ex. D.

defendant subsidiaries, signed third-party guarantees for three loans to the PIOCs made or guaranteed by Ex-Im. It is similarly undisputed that Tjiwi Kimia, Pindo Deli and Indah Kiat signed valid promissory notes for the thirteen loans with Ex-Im. Nor is it disputed that the PIOCs and APP have failed to repay these loans leading to an outstanding debt totaling $107,640,070.97 in principal and interest through June 30, 2005, for the loans guaranteed by APP and $104,344,903.60 before interest, costs, and other penalties for the loans to the PIOCs, inclusive of the loans guaranteed by APP.[3] It is also not disputed that the original lenders, having been paid by Ex-Im after the default by APP and the PIOCs, validly assigned each of the notes in question along with the guarantees and related rights to Ex-Im.[4]

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[3]The outstanding amount on the loans made to the PIOCs, exclusive of the amount guaranteed by APP, comes to $12,445,202.48 before interest and costs.

[4]Relying on Rule 56(e)("affidavit must be made on personal knowledge..."), Defendants contend that Plaintiff's motion for summary judgment as to the twelve loans for which Ex-Im served as guarantor must fail because Ex-Im did not provide sufficient evidence that it paid out under its guarantees on these loans. We reject this contention. Ex-Im submitted admissible evidence, in the form of a declaration by its Chief Financial Officer, Michael Discenza, of payment by Ex-Im of the amount it guaranteed on the twelve loans. APP and the PIOCs contend that this declaration does not suffice to meet the Rule's "personal knowledge" requirement. See Patterson v. County of Oneida, 375 F.3d 206, 219 (2d. Cir. 2004). We find, however, that Discenza's declaration meets this standard when considered in light of his position at Ex-Im. "We are of [the] opinion that, ordinarily, officers would have personal knowledge of the acts of their corporations." Catawba Indian Tribe v. South Carolina, 978 F.2d

(continued...)

Discussion

Defendants' default is not at issue here.[5] What is at issue here is whether Defendants' default is to be excused. APP and the PIOCs claim that one or more of their asserted defenses prevent Ex-Im from enforcing payment of the otherwise valid debt.

I

We address first the provisions of the agreements in the loans guaranteed by APP, and made to the PIOCS by several lenders. Ex-Im served as the lenders' guarantor for these loans. Ex-Im claims that APP waived any possible defenses in the loan contracts themselves, and that because of the force of the provisions of APP's agreements, none of APP's claimed defenses

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[4](...continued)
1334, 1342 (4th. Cir. 1992). See also, Ondis v. Barrows, 538 F. 2d 904, 907, fn. 3 (1st. Cir. 1974). (Holding that an officer can be expected to have personal knowledge of the affairs of the corporation.) While these decisions are not binding on us we find them persuasive here, especially as APP and the PIOCs have not submitted any evidence that might raise even the slightest doubt as to whether Ex-Im paid out on its guarantees.

[5]A prima facie case for payment upon default of a promissory note under New York law requires that the party seeking payment prove (1) the existence of a valid note, and (2) that the defendant has failed to pay despite demand, unless demand has been waived. Cavendish Traders, Ltd. v. Nice Skate Shoes, Ltd., 117 F. Supp. 2d 394, 399 (S.D.N.Y. 2000); Gateway State Bank v. Shangri-La Private Club for Women, Inc., 113 A.D. 2d 791, 493 N.Y.S. 2d 306 (2d Dep't 1987). As noted above, neither APP nor the PIOCs contest the existence of their debts or that Ex-Im has demanded payment on the debts that are now in default.

can prevail. As we will see, Ex-Im is correct because under New York law, and the facts of this case, APP's waiver settles the issue.

We pause to note, however, that Ex-Im offers arguments against each of the defenses asserted by APP, with regard to the debts guaranteed by APP. While we need deal only with the Ex-Im's contractual guarantee and waiver claim, because APP and the PIOCs assert the same litany of defenses, much of the analysis presented in Part II below would apply both to the PIOCs and to APP, i.e., the analysis below of the defenses asserted by the PIOCs would also apply to the assertion of the same defenses by APP. Nonetheless, because the loan guarantees signed by APP contain additional waivers of defenses and guarantees not found in the loan agreements signed by the PIOCs, we deal at the outset with APP. With regard to APP, we start and end our analysis with the loan guarantees made by APP, and APP's additional defenses need not be discussed.

Each of the loan agreements signed by APP contained absolute guarantees of payment and waivers of defenses. These guarantees and waivers of defenses state, in relevant part,

> FOR VALUE RECEIVED, the undersigned [APP], as primary obligor, hereby *unconditionally and irrevocably guarantees the full, prompt, and complete payment when due* (whether at scheduled maturity, by reason of acceleration or otherwise) of the principal of and interest on the foregoing promissory note, and hereby waives acceptance, diligence, presentment, demand, protest or notice of any kind whatsoever (including

notice of default or non-payment), as well as any requirement that the holder exhaust any right or take any action against the maker of the foregoing promissory note, and hereby consents to any extension of time or renewal or other modification thereof. *This is a continuing, absolute and unconditional guarantee of payment and not merely of collection.* To the maximum extent permitted by applicable law, the undersigned *hereby waives all defenses of a surety or guarantor to which it might be entitled by statute or otherwise.*
(Emphasis added)

Additional clauses contained in the various Credit Agreements state:

> No Waiver; Remedies Cumulative. No failure or delay on the part of the Agent, any Lender or Eximbank in exercising any right, power or privilege under this Agreement or the Note(s) and no course of dealing between or among the Borrower, the Guarantor, the Agent, and Lender and/or Eximbank shall operate as a waiver thereof...
>
> Amendment or Waiver. This Agreement may not be changed, discharged or terminated without the written consent of the parties hereto, and no provision hereof may be waived without the written consent of the party to be bound thereby.

The Credit Agreements signed by APP for each of the loans which it guaranteed further show the unconditional nature of the guarantees in this case:

> Guarantor Guarantee. The Guarantor hereby *unconditionally and irrevocably guarantees* to the Lender and Eximbank the full, prompt and complete payment when due (whether at stated maturity, by acceleration or other amounts payable by the Borrower to the Lenders or Eximbank under this Agreement or the Notes). If the Borrower shall fail to pay when due any or all sums hereby guaranteed, (whether at stated maturity, by acceleration or otherwise), the Guarantor shall forthwith pay, without any demand or notice, the

> full amount due and payable by the Borrower in U.S. Dollars at the place and in the manner required by this Agreement or Note(s). This is a guarantee of payment and not merely of collection, and shall remain in force and effect until all obligations of the Borrower hereby guaranteed are paid in full. To the maximum extent permitted by applicable law, the Guarantor *waives all defenses of a surety or guarantor to which it may be entitled by statute or otherwise*.
> (Emphasis added)

While APP might claim that these guarantee provisions did not exclude the assertion of all of its defenses, the unconditional nature of the guarantees and the nature of the waivers of defenses made by APP are most clearly illustrated by a final clause:

> Guarantee Continuing and Unconditional: (a) The Guarantor Guarantee is a *continuing, absolute and unconditional guarantee of payment* as a primary obligor and not merely as surety, and shall apply to all obligations of the Borrower under the Agreement and the Note(s) whenever arising. Without limiting the generality of the foregoing, the Guarantor Guarantee shall not be released, discharged or otherwise affected by . . . (v) any insolvency, bankruptcy, reorganization or other similar proceeding affecting the Borrower or its assets; or (vi) *any other act or omission to act or delay of any kind by the Borrower, the Guarantor, the Lenders, the Agent or Eximbank* or any other Person, or any other circumstances whatsoever *that might, but for the provisions of this Section 3.02 constitute a legal or equitable discharge or defense to the Guarantor's obligations* hereunder.
> (Emphasis added.)

Under New York law guarantees are usually acceptable in loan contracts and a party may, in such a guarantee, waive the defenses that she would otherwise have available. In order for a guarantee and a waiver of defenses in a loan contract to be

held valid the contract at issue must be between "sophisticated parties" represented by council and the guarantees and waivers must be "clear and unambiguous". Ursa Minor Ltd. v. Aon Fin. Pros.,2000 U.S. Dist. LEXIS 10166 at *20. *See also* Bank of New York v. Tri Polyta Finance B.V., 2003 U.S. Dist. LEXIS 6981 at *10-11. ("Under New York law, . . . unconditional guarantees with clear and unambiguous terms are enforceable and bar the assertion of affirmative defenses.") (Internal citation omitted.) Chemical Bank v. PIC Motors Corp., 452 N.Y.S. 2d 41 (upholding unconditional guarantee of payment despite potentially negligent or dishonest behavior of bank employees); Marine Midland Bank v. Walter Perlstein, Inc., 572 N.Y.S. 2d 789 (unconditional guarantee upheld even in face of doubt about validity of underlying instrument.) These conditions apply here. APP is a major international corporation and was represented by counsel in agreeing to the terms of the loan contracts. The language of the guarantees and waivers of defenses are clear and unambiguous, as the multiple detailed clauses indicate. Therefore, absent sufficiently strong argument otherwise, we must accept that APP has waived its affirmative defenses and therefore grant summary judgment for Ex-Im.[6]

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[6]Defendants contend that a separate clause in the credit agreements signed by APP as guarantor precludes waiver of equitable defenses notwithstanding the statements otherwise in the various guarantee clauses of the credit agreements. We (continued...)

APP disputes the claim that its guarantee and waiver of defenses prohibit it from bringing the defenses of estoppel, waiver, ratification, laches, and recoupment. APP cites case law to support its position, arguing that these cases establish that, notwithstanding APP's unconditional guarantee of payment and waiver of all defenses, the company may still assert their defenses in this case. The cases cited by APP, however, do not

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[6](...continued)
reject this contention because the credit agreement clause upon which the Defendants rely actually provides additional support for the Plaintiffs' claims rather than limiting those claims in the way that Defendants contend. The clause actually states, in pertinent part, "[E]ach such Borrower Document which may hereafter be executed and delivered will constitute, a direct, general and unconditional obligation of the Guarantor which is legal, valid and binding upon the Guarantor and enforceable against the Guarantor in accordance with its respective terms, except as such enforceability may be limited by... the application of general principles of equity regardless of whether such enforceability is considered in a proceeding at law or in equity." Plaintiff's Exhibit E-1 at 44. This clause does not operate to impose the limits suggested by Defendant for two reasons. First, as a rule, general clauses such as this are modified by the more specific clauses of the particular waivers and guarantees signed by APP. See, William Higgins & Sons Inc. v. State, 20 N.Y.2d. 425, 428 (N.Y. 1967)("A specific provision will not be set aside in favor of a catchall clause."). Secondly, and relatedly, under the terms of the agreement as written, as New York law generally allows waivers of defenses, the "general principles of equity" require that we give effect to the waivers, rather than expand the credit agreement clause to eliminate the guarantees and waivers from the contract. To do otherwise would be to fail to hold the parties to their written agreement, and, rather, hold them to an agreement other than the one which they have written and agreed to. Thus, with regard to the claims at issue here, the correct interpretation of the credit agreements clause is that it serves to support the enforcement of the guarantees and waivers at issue.

support their conclusion.

The primary case cited by APP is Rose v. Spa Realty Assoc., 42 N.Y. 2d 338. This case supports the proposition that a party to a contract may be equitably estopped from asserting a no oral modification clause when, "a party to a written agreement has induced another's significant and substantial reliance on an oral modification." Rose v. Spa Realty Assoc at 344. Such estoppel may only be applicable, however, when the "conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written," id, i.e., the conduct asserted to provide the basis for estoppel must be incompatible with the agreement. To determine whether the rule of Rose is applicable, therefore, we must consider APP's factual representations regarding the basis for its estoppel claim.

In summary, APP claims that it would not have undertaken some of the actions which it did undertake as part of an effort to restructure its debts if Ex-Im's representative had not suggested that APP do so. Even if we accept these representations as true, however, they are not sufficient to ground an estoppel claim under the rule of Rose because participation in any such negotiations on Ex-Im's part was completely "compatible with the agreement [that is, the loan agreement between Ex-Im and APP] as otherwise written." Rose at 345. No facts asserted by the Defendants here suggest that the

negotiations produced a result that was incompatible with enforcement of the agreement. Therefore, the rule of Rose is inapplicable to this case and does not support APP's estoppel claim.

Specifically, while Defendants claim that Ex-Im "induced" the Defendants to take certain actions, see infra, n.8, that constitute "modifications" to the loan agreements and that these "modifications" were agreed to because of Ex-Im's agent's representations that Ex-Im would approve the restructuring agreement, incompatibility is not present here because the conduct asserted to provide the basis for APP's estoppel claim is not incompatible with the loan agreements as written, i.e., none of the claimed modifications were of the character orally agreed to in Rose. In Rose the parties contracted for the deliver of 150 units and then orally modified this agreement so as to delivery only 96 units. An agreement to deliver only 96 units is clearly incompatible with an agreement to deliver 150 units. Rose at 345. In the present case, however, none of the claimed "modifications" precluded compliance or performance with the loan agreements in any way, and none actually required any modification of those agreements. Therefore, none of the actions undertaken by APP as part of its negotiation process with Ex-Im were "incompatible" with the original loan agreements in any way comparable to the modifications agreed in Rose.

Furthermore, the facts of Rose are in several ways distinguishable from those in this case. Most importantly, unlike the loan contracts in this case, the real estate contract in Rose did not contain any clauses waiving affirmative defenses. Next, the oral modification in Rose had been "acted on to completion" and the seller in that case had "actively lulled the purchaser into thinking the oral modification *had been* accepted" (emphasis added). While APP claims to have been induced to believe that the proposed re-structuring of its agreements had been accepted, there is, in the present case, no assertion of a comparable "action to completion" because any action undertaken by APP was, at most, preparatory for the repayment of already existing loans.

The other cases that APP cites in support of its estoppel defense also do not support its claims. Indemnity Insurance Co v. Levin, 563 N.Y.S. 2d 811 relies on Rose and does not significantly alter the above analysis. The contract at issue in Indemnity, like that in Rose, lacked a clause waiving affirmative defenses. Similarly, in Indemnity, once again, we find a party who fully performed on an oral modification clearly accepted by both parties, Indemnity, at 813-4, a fact not found in the present case.

Nassau Trust Co. v. Montrose Concrete Products Corp., 56 N.Y. 2d 175 differs from the present case in that in Nassau the

bank in question did not just engage in negotiations about restructuring a debt but rather granted an extension and then withdrew it without notice. While Ex-Im's representative may have engaged in negotiations with APP about restructuring APP's debt, there is nothing on which to base the inference that Ex-Im finalized any changes to the agreements. The cases are therefore distinct.[7] Furthermore, the loan contract in Nassau once again did not contain a waiver of defenses clause like that found in the loans signed by APP.

Canterbury Realty and Equipment Corp. v. Poughkeepsie Savings Bank, 524 N.Y.S. 2d 531, also does not support APP's estoppel defense. In Canterbury the New York State Appellate Division held that an unconditional guarantee of payment by the debtor party was limited by the bank's obligation to perform under the terms of the contract in question. Id. at 534.

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[7]Defendants contend that statements made by Ex-Im representative Charles Leik during the negotiation process, to the effect that if APP followed Ex-Im's demands then it would not sue, have the same effect as the extension granted by the bank in Nassau Trust. This is incorrect. Not only does Plaintiff claim that Leik, unlike the bank vice-president in Nassau Trust, lacked real or apparent authority to make such a guarantee, but, more importantly, at least for summary judgment purposes, the situation here and in Nassau Trust are fundamentally different. In Nassau Trust the claim relied upon by the defendants was a fundamental change to the existing underlying agreement, one incompatible with the original agreement's time limit and "no oral modification" clause. Nassau Trust at 179. But, as noted before, any statements made by Leik were, at most, preparatory to an eventual modification and not incompatible with the underlying agreement between Defendants and Ex-Im.

Additionally, the bank in Canterbury engaged in affirmative wrongful conduct that directly led to the default by the debtor party. Id. at 534-5. Neither factor is present in the instant case. Here Ex-Im seeks to enforce APP's original agreement and there is no claim that Ex-Im did not itself perform its obligations under the loan contract with APP. Moreover, there is no evidence or possible inference that Ex-Im was in any way responsible for APP's default on its loans. Therefore, Canterbury is distinguishable from the present case and cannot support APP's estoppel defense. Given this, we must hold that APP has waived any affirmative defenses that it otherwise might have been able to assert against Ex-Im.

II

As noted above, Ex-Im also moves for summary judgment, against the PIOCs, for default on loans totally $104,344,903.60 in principal plus interest and further costs. In opposition to Ex-Im's motion, the PIOCs assert the same litany of affirmative defenses raised by APP: estoppel, waiver, ratification, laches, and recoupment. However, because the loan agreements signed by the PIOCs did not contain the unconditional guarantees and waivers of defenses contained in the loan guarantees signed by APP, we must here look at the evidence presented in support of these claims to determine whether that evidence, and any reasonable inferences, could provide a basis for a legally

sufficient defense.[8] In order to survive a motion for summary judgment, the non-movant must invoke more than just "metaphysical doubt as to the material facts." Rather, the non-moving party must offer sufficient evidence to enable a reasonable finder of fact to return a verdict in its favor. Bradely v.City of New York, 2007 U.S. District Lexis 7811, *5-*6 (S.D.N.Y. 2007.) (Internal citation omitted.) See also, Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998.)

The most substantial defense offered by the PIOCs is equitable estoppel. The PIOCs contend, like APP, that Ex-Im, because it took part in a series of negotiations to re-structure their debt and because Defendants undertook certain actions that they might not have otherwise undertaken,[9] ought to be estopped from suing the PIOCs on their outstanding debt. Under normal circumstances, for a party to prevail on an estoppel defense it must show that, (1) it relied on the opposing party's conduct, (2) this reliance caused it injury or detriment, and (3) this reliance was "reasonable in that [it] did not know or should have known that its adversary's conduct was misleading." In re

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[8]Recall that this analysis would apply as well to the merits of these defenses when asserted by APP, though we did not need to reach this issue.

[9]This point is, of course, contestable because the actions which Ex-Im allegedly "induced" were all payments or steps towards payment of debts by APP and the PIOCs on obligations which were otherwise valid, that is, that the Defendants had existing obligations to pay.

Becker, 407 F.3d 89, 99 (2d Cir. 2005). However, when a government agency is involved, a higher standard is applied, Becker, at 99, requiring the party asserting estoppel to show not only the three elements listed above but also that the government agency in question engaged in "affirmative misconduct". Drozd v. INS, 155 F.3d 81, 90 (2nd Cir. 1998).

It is not disputable that Ex-Im was, in the transactions in question, acting as a government agency. 12 U.S.C. § 635(a)(1) establishes Ex-Im as, "[A]n agency of the United States of America" working to "[maintain] and contribute to the employment of U.S. workers" by "facilitat[ing] the export of goods and services" from the United States. 12 U.S.C. § 635(a)(1). That Ex-Im acts as a governmental and not a private agency is further indicated by the legal requirement that it, in its actions, must, "supplement and encourage, and not compete with, private capital" and must take care that its actions do not adversely effect U.S. industry. 12 U.S.C. § 635(b)(1)(B). These factors establish that Ex-Im is a governmental agency and acts, when providing loans and loan guarantees, in a governmental and not a commercial manner. Ex-Im is, therefore, eligible for the higher standard needed to establish an estoppel defense granted to government agencies.[10]

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[10]Defendants make an argument we must briefly address here, specifically, that, "this Court has ruled already that the normal (continued...)

Because affirmative misconduct is a higher standard than is needed to establish a defense of estoppel in normal circumstances, the government may be estopped "only in very limited and unusual circumstances." U.S. v. Boccanfuso, 882 F.2d 666, 670 (2nd Cir. 1989). The PIOCs have not provided evidence that could establish "affirmative misconduct" on the part of Ex-Im. Even assuming that the defendants' account of the negotiations between APP and the PIOCs on the one hand, and Ex-Im on the other, is completely true, the defendants have not presented any evidence upon which a reasonable fact-finder could conclude that Ex-Im engaged in "affirmative misconduct". This is especially so because each action that Ex-Im "induced" (here

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[10](...continued)
rules of estoppel [excluding the governmental misconduct standard] apply in this case" as a result of Judge Swain's decision refusing to grant discovery into Ex-Im's internal deliberations. Defendant's Memorandum of Law at 23. Defendants are not correct. This Court has at no time ruled that the "normal rules of estoppel apply" in this case. On the contrary, Judge Swain's decision of March 14, 2006 indicates the opposite. In that decision, Judge Swain upheld all of the orders of Magistrate Judge Francis specified in his Memorandum and Order dated November 8, 2005. Magistrate Judge Francis, in that Order, explicitly held that the higher "affirmative misconduct" standard of estoppel appropriate for claims against the federal government applied in this case. Memorandum and Order of Magistrate Judge Francis dated November 8, 2005 at 9. Furthermore, Magistrate Judge Francis held that this finding rendered Defendants' estoppel claim "futile" because Defendants could not hope to show government misconduct, and that therefore further discovery was not appropriate. Id. at 8. Because this order was upheld in its entirety by Judge Swain, Defendants are, at best, completely mistaken in their claim.

assuming this is the proper term) the Defendants to undertake was an action which the Defendants already had legal obligations to undertake.[11] It is completely unclear how such "inducement" could amount to "affirmative misconduct".

In an earlier hearing relating to this same subject matter Magistrate Judge Francis correctly noted that the sort of behavior allegedly undertaken by Ex-Im, i.e., aggressive negotiations in the service of recovering money owed to it, including extracting concessions from the debtors, "is hardly egregious." (Light Supp. Decl. Ex.L, at 9). See also United States v. Wallace & Wallace Fuel Oil Co., 540 F. Supp. 419, 431 (S.D.N.Y. 1982) (holding that an estoppel defense is not established when one party attempts, via negotiation, to procure money owed to it without resorting to litigation and then later sues to recover the money after negotiations break down.) Because the PIOCs have not presented evidence which could demonstrate that Ex-Im engaged in behavior amounting to "affirmative misconduct" during the negotiations to restructure

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[11]Examples of actions taken by the PIOCs and APP that they contend they would not have undertaken without "inducement" from Ex-Im include making a payment of $90,000,000.00 to the Indonesian Bank Restructuring Agency (IBRA) and placing several hundreds of millions of dollars into escrow. Defendants' Memorandum of Law 8-13. However, the money paid to IBRA by Defendants was for an existing debt and cannot therefore be considered a detriment. The requiring of funds to be paid into escrow appears to be a legitimate measure undertaken to ensure that creditors were paid. In any case, neither action rises to the level of "affirmative misconduct".

APP's and the PIOC's debt, they cannot establish the defense of equitable estoppel. [12]

Finally on the matter of estoppel, based on their submission here, the PIOCs could not establish an estoppel claim, even on the non-governmental standard, because, as noted above, an estoppel claim requires that the "conduct relied upon [by the party seeking to establish estoppel] must not otherwise be compatible with the agreement as written." Rose, 42 N.Y. 2d at 344. Here, because the alleged negotiations undertaken by Ex-Im were not in any way incompatible with the "agreement as written", there can be no basis for an estoppel defense. In light of these considerations the court must, as a matter of law, reject the PIOCs affirmative defense of equitable estoppel.

In addition to equitable estoppel the PIOCs assert affirmative defenses of ratification, laches, and recoupment. The PIOCs have, however, fail to offer any evidence that could ground such defenses. Ratification requires, "the express or implied adoption of the acts of another by one for whom the other

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[12]Because the PIOCs have not presented evidence that could meet the higher burden required to assert a defense of estoppel against a government agency, we need not explicitly discuss Ex-Im's claims, asserted in reply to PIOC's estoppel claim, that the estoppel defense is also blocked because, first, public funds appropriated from the treasury are here at issue, and secondly that Ex-Im (as a government agency) could only be estopped by statements made by someone with actual authority to bind the government, something claimed by Ex-Im not to exist in this case.

assumes to be acting, but without authority." Holm v. C.M.P. Sheet Metal, Inc., 455 N.Y.S. 2d 429, 432 (4th Dep't 1982). See also, 21 NY Jur, Estoppel, Ratification, and Waivers, § 85. In this case, therefore, ratification would require that Ex-Im's management adopt any agreements supposedly made by the participants in the re-settlement negotiations. Neither APP nor the PIOCs have presented any evidence that such ratification took place or could reasonably be inferred. This defense, therefore, cannot stand.

Laches, or unreasonable delay, is also not available to the PIOCs as a defense here. For laches to be available against the government, the party asserting the defense must show that, at a minimum, the suit was filed outside of the statute of limitations. U.S. v. Milstein, 401 F.3d 53, 63 (2d Cir. 2005). This is not the case here, and neither APP nor the PIOCs have presented any evidence to the contrary.

Finally, recoupment is a "deduction from a money claim through a process whereby cross demands arising out of the same transaction are allowed to compensate one another and the balance only to be recovered." New York State Elec. & Gas Co. v. McMahon, 129 F.3d 93, 96 (2d Cir. 1997). We here note that recoupment is more properly a counter-claim rather than an equitable defense. Even broadly construed, Defendants claims could not be asserted to establish a counter-claim that could

affect the net liability of the parties and that arises out of the same transactions as the asserted claim. Therefore, this defense cannot be maintained.

Conclusion

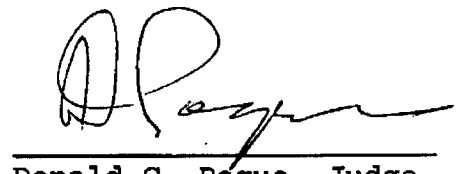
The record here conclusively establishes that Ex-Im made or guaranteed a number of loans to the PIOCs, several of which were in turn guaranteed by APP. These loans are now all in default. These facts are undisputed facts and there is insufficient evidence to raise a material question of fact with regard to any special circumstances or legally sufficient affirmative defense. Because neither APP nor the PIOCs can establish the grounds needed for their various affirmative defenses, summary judgment for Ex-Im is therefore appropriate.

Judgment will therefore be entered for Ex-Im against APP for the amount of $107,640,070.92 plus additional interest and costs, against PT Indah Kiat Pulp and Paper TBK for $52,438,001.60 plus interest and costs, against PT Pabrik Kertas Tjiwi Kimia TBK for $48,148,935.32 plus interest and costs, and against PT Pindo Deli Pulp and Paper Mills for $3,757,966.73 plus interest and costs.

The parties are directed to confer and prepare a draft judgment in accordance with this opinion. A draft judgment should be submitted by March 6, 2008. If the parties are unable to agree on an appropriate judgment, each party shall submit its

proposed draft judgment by the date specified.

It is SO ORDERED.



Donald C. Pogue, Judge

Dated: February 6, 2008
New York, New York