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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

DENNIS SPRUNG as Executor of the ESTATE OF ROGER RECHLER,

Plaintiff,

INDEX No. 004500/09

MOTION DATE: Jan. 8, 2010
Motion Sequence # 001, 002

-against-

GLENN HOROWITZ BOOKSELLER, INC. and GLENN HOROWITZ,

Defendants.

GLENN HOROWITZ BOOKSELLER, INC.,

Counterclaim Plaintiff,

-against-

DENNIS SPRUNG, as Executor of the ESTATE OF ROGER RECHLER,

Counterclaim Defendant.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affidavit in Opposition and Further Support..... X

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Reply Affirmation X
Memorandum of Law..... XXX
Reply Memorandum of Law..... X

This motion, for an order pursuant to, ***inter alia***, CPLR 3212, 3124 the defendants-counterclaim plaintiffs, Glenn Horowitz Bookseller, Inc. and Glenn Horowitz, for: (1) partial summary judgment on its account stated counterclaim; and (2) a protective order with respect to stated discovery demands served by the plaintiff Dennis Sprung, as Executor of the Estate of Roger Rechler; and a cross-motion, by the plaintiff Dennis Sprung, as Executor of the Estate of Roger Rechler, pursuant to, ***inter alia***, CPLR 3025[b], 3212, 3124, for an order: (1) granting him leave to amend his complaint; (2) compelling compliance with stated discovery demands; and (3) dismissing the defendants' second and third counterclaims sounding in quantum meruit and account stated, are **both** determined as hereinafter set forth.

In March of 2009, the plaintiff Dennis Sprung, as executor of the Estate of Roger Rechler commenced the within action as against Glenn Horowitz Bookseller, Inc ["GHB"] and its principal, Glenn Horowitz [collectively the "defendants"]. In sum, the action demands an accounting and/or the recovery of proceeds, if any, allegedly generated upon the defendants' disposition of some 14 "lots" of rare books which had, among others, been entrusted to the defendants by Rechler prior to his death in 2008.

According to Horowitz – whom Rechler first met in 1992 – he and GHB "sold hundreds of rare books and related objects" to Rechler throughout an eight-year period in the 1990's, for which Rechler paid an aggregate sum of approximately $2.7 million.

Thereafter, at some point in 2002, Rechler approached Horowitz and asked him to sell his rare book collection. The record indicates that in response, Horowitz arranged for the books to be auctioned by Christies; that some 238 book lots were later sold at the October, 2002 Christies auction – some of which were purchased by Horowitz himself with Rechler's knowledge; and that the Christies auction netted Rechler an overall profit of some $3.2 million – although an additional, 137 auction book lots were left unsold after the auction was completed.

Notably, although Horowitz arranged the auction, Horowitz did not represent Rechler at the Christie's auction and charged no seller's commission in connection with the

event.

The remaining 137 book lots were thereafter entrusted to the defendants with the understanding that they would be sold for an agreed-upon commission of 20%. At some point in August of 2003, Horowitz himself apparently offered to purchase the remaining, 137 lots for the proposed sum of $1 million dollars, although Rechler rejected that offer.

During the ensuing three or four years (until the end of 2006), Horowitz and GHB disposed of most of the remaining books lots through third-party sales and later, by arranging a 50-lot donation (which was completed in December of 2006), to the University of Texas ["UT"] – an institution with which Horowitz had maintained a longstanding business and/or professional relationship.

An attached cover letter and formal appraisal performed by Horowitz dated December 11, 2006: (1) values the UT book donation at $652,752.00; and (2) also advises in part that "[t]he appraiser was paid a flat fee for services rendered" (Yaffe Exh., "F"). There is no contemporaneous documentation suggesting that the defendants ever demanded compensation for the services they provided with respect to the UT donation.

In July of 2006, a few months before the UT donation was completed, Horowitz wrote to Rechler's wife, advising without explanatory comment, that "I owe Roger 190 grand to finish up our business" (Cmplt., ¶¶ 30-31; Defs' Exh., "F").

Apparently, by that point, Horowitz had developed a degreee of prominence in the literary archive world, as evidenced in part by a March 2007, the *New York Times*, "Sunday Book Review" article entitled, "*The Paper Chase.*" In substance, the article describes the then-current state of the literary archive market and depicts Horowitz as a major player in that arena. Although the article lauds Horowitz as an innovator in the archive field, it also touts him as a "savvy dealer" and shrewd "book trader" with "sharp elbows" – a man who blends the "curiosity of an intellectual" with the "instincts of a business man" (Pltff's Exh., "H").

The piece further suggests that Horowitz' practices have been responsible, in part, for generating higher prices for his clients and also helped propel the archive "market through the roof" – albeit not without Horowitz himself also "getting a slice of the profits every step of the way".

The *Times* quotes Horowitz as stating that it was he who originally "prevailed upon"

Rechler to invest in "first editions of 20th century literature" and further comments that Horowitz' conduct in personally acquiring Rechler's books at the Christies auction was "somewhat unusual" – although Horowitz later summed up his practices and philosophical approach by informing the *Times* reporter, "[t]hat's what I do * * * I trade books" (Article at 5 [Internet Pagination] Pltff's Exh., "H").

After the Christies auction was concluded in 2002 – and as the sale of the 137 book lots progressed (primarily in 2004 and 2005), the defendants sent Rechler so-called spreadsheet statements which contained columned information listing, ***inter alia***, the book lots which had been sold; the price Rechler originally paid for the books in question; and the commission amounts which had been deducted from the sale proceeds, which amounts were thereafter forwarded to Rechler (Defs' Exhs., "A"- "C").

Prior to sending the spreadsheets, Horowitz wrote a brief letter to Rechler – which included a spreadsheet exemplar – informing him that "this is the [spreadsheet] version I'll use henceforth. I'll supply an update on the first of each month * * *" (Horowitz [July 29] Aff., Exh., "E").

Thereafter, Rechler received and retained the defendants' periodic spreadsheet statements and the payments made pursuant thereto, without relevant comment or objection for a period of some two years (A. Cmplt., ¶¶ 58-59). By 2007, the defendants had allegedly forwarded over $400,000.00 in sale proceeds to Rechler, although by their own admission, they still owed him an additional, $90,000.00 at that juncture.

The plaintiff claims that after all the foregoing dispositions were completed in 2006, including the UT donation, there supposedly were still 14 book lots unaccounted for and/or unsold – book lots which had been, or still were, in the defendants' possession, a claim the defendants dispute.

Moreover, the plaintiff assert that many of the defendants' post-auction book sales were made at a loss, or for a *de minimus* gain – sales which cumulatively netted Rechler only some $75,065.00 in total profit, but which at the same time generated commissions of approximately $195,000.00.

In light of the foregoing, the plaintiff's complaint demands injunctive relief compelling the return of the foregoing books lots and an accounting relating to "all 137 lots" entrusted to the defendants after the 2002 auction was conducted.

The defendants have since answered, denied the material allegations of the complaint, set forth various affirmative defenses and interposed three counterclaims, sounding in breach of implied contract, quantum meruit and account stated.

The defendants' account stated claim alleges, ***inter alia***, that the spreadsheet statements received, without objection by Rechler, constituted a final and conclusive reckoning as to the sums paid and commissions deducted, thereby barring the plaintiff from any additional recovery or relief arising out of the book dispositions. The quantum meruit counterclaim is predicated on the theory that Rechler agreed to compensate the defendants for the services they rendered in connection with the 2006 UT auction, but that the defendants were never paid the 25% commission-based fee (some $163,000.00), which had supposedly been agreed to.

Upon the instant notice, the defendants now move for summary judgment on their account stated (third) counterclaim and for a protective order with respect to certain discovery demands and interrogatories propounded by the plaintiff in notices dated June, 2009.

The plaintiff opposes the application and cross moves for leave to amend his complaint so as to add claims sounding in fraud, breach of fiduciary duty and accounting.

The plaintiff also demands additional relief: (1) compelling the defendants to comply with his discovery demands; and (2) dismissing the defendants' second (quantum meruit) and third (account stated) counterclaims.

The defendants have now withdrawn portions of the foregoing account stated claim, at least to the extent calculated on a straight, percentage (25%) basis – although they currently assert entitlement to a "reasonable" compensation for the UT services provided.

Upon the papers submitted, the plaintiff's motion to amend is **granted**. The parties' respective applications for summary judgment are **denied**. Lastly, that branch of the defendants' motion which is for a protective order is **granted**. The plaintiff's related motion to compel is **denied**.

With respect to the plaintiff's motion to amend, it is settled that leave to amend "is to be freely granted, provided that the proposed amendment does not prejudice or surprise the defendant, is not patently devoid of merit, and is not palpably insufficient (***Tyson v.***

Tower Ins. Co., *NY*, 68 AD3d 977, 2nd Dept., 2009).

Further, "[m]ere lateness is not a barrier to the amendment," since "[i]t must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (***Edenwald Contr. Co. v. City of New York***, 60 NY2d 957, 959, 1983).

In order "[t]o establish prejudice, which must be significant * * * there must be some indication that the opposing party will have been hindered in the preparation of its case or prevented from taking some measure to support its position" (***Spitzer v. Schussel***, ***supra***; *see,* ***Edenwald Contr. Co. v. City of New York***, ***supra***; ***Murray v. City of New York***, 43 NY2d 400, 405, 1977).

The decision whether to grant leave to amend a pleading rests within the Supreme Court's broad discretion, and "the exercise of that discretion will not be lightly disturbed" (***Gitlin v Chirinkin***, 60 AD3d 901, 902, 2nd Dept., 2009).

Preliminarily, while fraud and fiduciary duty claims must be pleaded with particularity in accord with CPLR 3016[b](***Eurycleia Partners, LP v. Seward & Kissel, LLP***, 12 NY3d 553, 559, 2009) "unassailable proof of fraud" is not required; nor is CPLR 3016 to be "so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (***Pludeman v. Northern Leasing Sys., Inc.***, 10 NY3d 486, 491, 2008).

Rather, and in such a case, "a plaintiff need only provide detail to inform defendants of the substance of the claims;" namely, pleaded facts which adequately apprise them of the misconduct complained of.

The plaintiff's proposed claims are sufficient to satisfy these requirements (*e.g.*, ***O'Keefe v. Citibank, N.A.***, 15 AD3d 277, 1st Dept., 2005).

Although the amended complaint does not detail precisely how each and every disposition was tainted by fraud and/or self-dealing, the record suggests that at this pre-discovery juncture, key facts may "'peculiarly within the knowledge of the party against whom the [fraud] is being asserted'" (***Bernstein v. Kelso & Co., Inc.***, 231 AD2d 314, 320-321, *quoting from*, ***Jered Contr. Corp. v New York City Tr. Auth.***, 22 NY2d 187, 194).

More particularly, the plaintiff's proposed claims derive primarily from transactions

which were conducted solely by the defendants, who – as alleged fiduciaries – not only maintained custody of the book materials entrusted to them, but also had singular knowledge of the relevant details surrounding each of the subject dispositions. Nor does it appear that Rechler would have, at his disposal, the means to independently or determinatively confirm the veracity of the spreadsheet sales data which he received from the defendants. Upon these facts, the plaintiff-executor cannot be expected to possess detailed factual information relative to the specific acts and occurrences underlying the proposed claims advanced (***Yuko Ito v. Suzuki***, 57 AD3d 205, 208-209, 1st Dept., 2005).

Nor have the defendants not meaningfully addressed the plaintiff's assertion that a fiduciary-type relationship existed between the parties by virtue of Rechler's conduct in entrusting his rare book cokllection to the defendants for disposition (*see,* ***Bouley v. Bouley***, 19 AD3d 1049, 1051, 4th Dept., 2005).

Lastly, the defendants have not established laches as a matter of law (*e.g.,* ***Skrodelis v. Norbergs***, ***supra***, 272 AD2d 316, 317), or otherwise demonstrated the manner in which they would be significantly prejudiced if the Court were to exercise its discretion in favor of granting the plaintiff's motion for leave to amend (***Rosicki, Rosicki and Associates, P.C. v. Cochems***, 59 AD3d 512, 514, 2nd Dept., 2009).

In light of the foregoing, and since "discovery, including depositions, has not been completed" (***Rosicki, Rosicki and Associates, P.C. v. Cochems***, ***supra***, ***Yuko Ito v. Suzuki***, ***supra***), the Court cannot conclude that the plaintiff's proposed claims are "patently devoid of merit" or otherwise lacking so as to warrant denial of his motion to amend (*see,* ***Tyson v. Tower Ins. Co. of New York***, ***supra***, 68 AD3d 977).

Those branches of the parties' respective summary judgment applications relating to the defendants' account stated (third) counterclaim, however, is **denied**.

In sum, an account stated is an agreement, express or implied, "between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (***Jim-Mar Corp. v. Aquatic Const., Ltd.***, 195 AD2d 868, 870, 3d Dept., 1923).

The parties themselves may expressly agree to treat certain statements or writings as an "account stated" documents (***Gurney, Becker & Bourne, Inc. v. Benderson Development Co., Inc.***, 47 NY2d at 996; ***M. Paladino, Inc. v. J. Lucchese & Son***

Contracting Corp., 247 AD2d 515, 516).

The failure to seasonably object to a properly constituted bills or statements will give rise to an enforceable account stated (***Gassman & Keidel, P.C. v. Adlerstein***, 63 AD3d 784).

Notably, "[t]he doctrine of account stated may be raised by * * * an account obligor or by a defendant seeking to prevent the reopening of a paid account * * *" (***In re Rockefeller Center Properties***, 241 B.R. 804, 819, S.D.N.Y. 1999, *aff'd*, ___ F2d ___, 46 Fed.Appx. 40, 2nd Cir. 2002; *see*, ***Lockwood v. Thorne***, 11 NY 170, 1854 WL 5991, 1854).

Preliminarily, the Court disagrees with the plaintiff's theory that the defendants are exclusively debtors and/or fiduciary-trustees and therefore cannot, as a matter of law, assert an "account stated" theory/defense with respect to the transactions at bar (*cf.*, ***In re Rockefeller Center Properties***, ***supra***; ***Gross v. Empire Healthchoice Assur., Inc.*** ___Misc3d___2007 WL 2066390, at 6 [Supreme Court, New York County 2006]).

Here, and viewed favorably to the defendants as the opponents of the plaintiff's motion (***Fundamental Portfolio Advisors, Inc. v. Tocqueville***, 7 NY3d 96, 106, 2006), the record can be viewed as supporting an inference that the parties agreed, ***inter alia***, that the defendants would retain possession of the book lots; that the defendants would then sell and/or dispose of the items in exchange for a stated, 20% commission; that the commission debts owed would be effectively billed and then paid through deductions made from the sales proceeds; and that the transactions – and commission debts owed and then paid – would be periodically memorialized in the written statements of the sort referenced in Horowitz' January 2004 letter (Defs' Exh., "E").

The fact that the sums owed by the plaintiff for the services provided were not separately demanded in discrete billing statements (***Erdman Anthony & Associates, Inc. v. Barkstrom***, ***supra***, 298 AD2d 981), is not determinative in this context, since the parties themselves allegedly agreed from the outset that the commission debts due would be paid from the sales proceeds and then recorded as such in statements conforming to Horowitz' 2004 "exemplar" sheet (***Kensington Pub. Corp. v. Kable News Co., Inc.***, 100 AD2d 802, 803; *cf.*, ***Sisters of Charity Hosp. of Buffalo v. Riley***, 231 AD2d 272, 282-283).

While the plaintiff contends that the sheets provided lacked sufficient itemization, and/or back-up data, a lack of itemization does not alone preclude the existence of an account stated (***Zanani v. Schvimmer***, 50 AD3d 445, 446; ***Shea & Gould v. Burr***, 194 AD2d 369,

371), if, in fact, the parties entered into "an express agreement *** to treat the statement as an account" (***Gurney, Becker & Bourne, Inc. v. Benderson Development Co., Inc.***, ***supra***, at 997).

In general, parties – including even those in fiduciary-type relationships – "are free to make their contracts" (***Kaygreen Realty Co. v. Goldman***, 231 AD2d 682, 684), and may determine for themselves "the manner in which such an accounting should be had" (***Kensington Pub. Corp. v. Kable News Co., Inc.***, ***supra***; *see generally,* ***Corr v. Hoffman***, 256 NY 254, 266, 1931).

The plaintiff's reliance upon the Supreme Court's holding in the ***Gross*** case, ***supra***, is misplaced. ***Gross*** – which is not binding on this Court – involved a factually and legally distinguishable attempt by a plaintiff-physician to apply an "account stated" theory to medical reimbursement claims he had previously submitted – claims which the defendant-medical carrier had initially authorized and paid, but which it later rejected and then sought to affirmatively recoup.

Unlike ***Gross***, however – where the Court was influenced by the highly unusual, "medical reimbursement" context in which the plaintiff-physician's claim was asserted (*see,* ***Gross v. Empire Healthchoice Assur., Inc.***, ***supra***, at 6) – at bar, the defendants' account stated claim – which has been documented in an agreed-upon format: (1) arises out of a simple agreement obligating the plaintiff to pay commissions on book sales; and (2) has been interposed as a defense to the plaintiff's own, prior-commenced claim for an affirmative recovery – the latter being a potential exception referenced by the Court in ***Gross***.

In short, assuming sufficient proof of all other relevant requirements, the Court sees no technical reason why, as the record currently stands, the involved transactions could not give rise to an account stated defense establishing the accuracy of the amounts Rechler allegedly received and retained without objection (***Rosner v. Globe Valve Corporation***, 196 Misc 408, 409).

However, triable issues of fact exist with respect to the alleged account which cannot be summarily resolved as a matter of law. More particularly, while a failure to timely object to a properly framed account will generally be conclusive, nevertheless a party will not be bound by an account stated absent knowledge of the circumstances relating to the actual amount due (*see,* ***National Surety Co. v. President, etc., of Manhattan Co.***, 252 NY 247), or where fraud, mistake or other equitable considerations have been properly established (***Sea***

Modes, Inc. v. Cohen, 309 NY 1, 3-4 1955).

Here, the Court has only just authorized the addition of claims sounding in, ***inter alia***, fraud and breach of fiduciary duty, none of which have been subjected to the scrutiny of discovery. Additionally, and despite the January, 2004 spreadsheet "exemplar" letter, the plaintiff has raised questions as to the accuracy, consistency and origin of certain spreadsheet statements and the notations contained therein – including the defendants' December 19, 2005 sheet, and the now admittedly errant application of a 25% commission rate to certain sale dispositions.

Further, an independent duty to account may also arise by virtue of the parties' alleged fiduciary relationship, which may – or may not – be governed by the purported agreement with respect to the documentation provided by the defendants (***Kensington Pub. Corp. v. Kable News Co., Inc.***, ***supra***).

Lastly, it is settled that parties "should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment" (***Venables v. Sagona***, 46 AD3d 672). It is clear that the parties' respective motions have been made before any significant or meaningful discovery has been conducted and that there may be key facts "within the knowledge of individuals who had not yet been deposed" (***Yerushalmi & Associates, LLP v. Westland Overseas Corp.***, 21 AD3d 1098, 1099).

Upon the conflicting allegations and claims advanced by the parties, the Court cannot reach any determinative conclusion with respect to the the defendants' account stated theory (*see generally,* ***Afzal v. Board of Fire Com'rs of Bellmore Fire Dist.***, 23 AD3d 507; ***Arrow Employment Agency, Inc. v. David Rosen Bakery Supplies***, 2 AD3d 762).

Similarly, that branch of the plaintiff's motion which is for dismissal of the defendants' quantum meruit (second) counterclaim – which is based upon services provided with respect to the UT donation – is also **denied**.

As to the plaintiff's "unclean hands" dismissal theory, on which it primarily relies, the Court cannot render any conclusive holding at this point concerning that fact-dependent defense (*see generally,* ***Frank v. Sobel***, 38 AD3d 229, 230; ***Buller v. Giorno***, 28 AD3d 258).

Further, although a claim grounded on a quantum meruit theory will generally fail where a valid and binding contract exists arising out of the same subject matter

(***Clark-Fitzpatrick, Inc., v. Long Is. R.R.***, 70 NY2d 382, 388-389, 1987; *see,* ***IDT Corp. v. Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, 142, 2009), it is equally settled that when "'there is a bona fide dispute as to the existence of a contract * * * a * * * [party] may proceed upon a theory of quasi-contract as well as breach of contract and will not be required to elect his or her remedies'" (***AHA Sales, Inc. v. Creative Bath Products, Inc.***, 58 AD3d 6, 20, *quoting from,* ***Hochman v. LaRea***, 14 AD3d 653, 654-655).

Viewing the evidence most favorably to the defendants, the plaintiff has plainly denied "the very existence" of the alleged agreement to pay for services relating to the UT donation (*see,* ***Elbroji v. 22 East 54th Street Restaurant Corp.***, 67 AD3d 957, 958; ***Halliwell v. Gordon***, 61 AD3d 932, 934).

Moreover, while the underlying appraisal agreement states that the defendants received a "flat fee" for the appraisal – a claim which the defendants now deny, the Court reads the defendants' quantum meruit allegations as demanding compensation for services rendered over and above the subsequent preparation of the UT appraisal (*see,* ***Snitovsky v. Forest Hills Orthopedic Group***, *P.C.*, 44 AD3d 845).

Summary judgment is a drastic remedy (*see,* ***Andre v. Pomeroy***, 35 NY2d 361, 1974; ***Mosheyev v. Pilevsky***, 283 AD2d 469), and "[e]ven the color of a triable issue forecloses the remedy" (***In re Cuttitto Family Trust***, 10 AD3d 656; ***Rudnitsky v. Robbins***, 191 AD2d 488, 489).

Turning to the parties' respective discovery applications, the parties' submissions indicate that by notices dated June, 2009, the plaintiff served detailed interrogatories and a notice of discovery and inspection – in response to which the defendants have made the instant application for, ***inter alia***, a protective order.

The record establishes that the plaintiff's interrogatories and discovery/inspection notice collectively encompass over 75 separate parts and items, exclusive of extensive instructional provisions, and include a separate document demands attached to the interrogatories – demands which have been partially duplicated in the plaintiff's notice of discovery and inspection.

In support of their application, the defendants contend, ***inter alia***, that certain document demands are over broad, oppressive, and request information with respect to collateral issues as to which specific claims have not been advanced. The Court agrees to the

extent indicated below.

Although disclosure is "open and far-reaching"(***Kavanagh v.Ogden Allied Maintenance Corp.***, 92 NY2d 952, 954, 1998), and that immunity therefrom must be established by the resisting party (***Spectrum Systems Intern. Corp. v. Chemical Bank***, 78 NY2d 371, 377, 1991), nevertheless "unlimited disclosure is not required" (***Smith v. Moore***, 31 AD3d 628), nor will "*carte blanche* demands * * * be honored" (***European American Bank v. Competition Motors, Ltd.***, 186 AD2d 784, 785), particularly where the demands at issue would attach "undue attention" to collateral matters (***Blittner v. Berg and Dorf***, 138 AD2d 439, 440-441), or where they are overly broad, unduly burdensome, or lacking in specificity (*see,* ***M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.***, 62 NY2d 75, 79, 1984).

Moreover, "unparticularized document demands" (***M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.***, ***supra***), and those employing categorical or unrefined introductory, terminology, such "all," "any and all" or "each and every" are generally disfavored (*e.g.,* ***Watson v. Esposito***, 231 AD2d 512, 516).

Even where, as here, objections have not been timely interposed, as required by CPLR 3122(a), the Court may always strike demands which are "palpably improper," including those which are over broad and unduly oppressive (***McMahon v. Aviette Agency***, 301 AD2d 820, 821; ***Zambelis v. Nicholas***, 92 AD2d 936, 937).

With these principles in mind, and upon balancing the "competing interests" at issue (***Kavanagh v. Ogden Allied Maint. Corp.***, ***supra***, at 95), the Court finds that the majority of the document demands propounded are palpably improper and over broad. Apart from the fact that the foregoing demands/items have been uniformly prefaced by the disfavored generality, "all", the demands are open-ended and request materials lacking in ostensible materiality and relevance.

Among other things, the demands request – often without stated temporal limit – the production of, *inter alia*, of "all" documents "reflecting" or relating to "correspondence or communications" between the defendants and Rechler concerning the original acquisition of Rechler's collection in the 1990's; "all" documents, in substance, which relate to each book lot purchased by the defendant at the Christies auction, together with the lots' ultimate and subsequent disposition; and "all" documents which reflect any agreements or

arrangements with – or compensation obtained from – any third party "in connection with" all rare book or manuscript appraisal performed by the defendants from 2000 onward. The foregoing demands, if literally enforced, would encompass virtually every document – material or not – which in any way relates to, or even mentions, the original book acquisition process and/or the defendants' acquisition or disposition of books at the Christies auction (***Watson v. Esposito***, 231 AD2d 512, 516). Indeed, a majority of the ensuing document requests are similarly framed in over broad fashion and/or sweepingly inclusive language, which demand "all" documents "reflecting," ***inter alia***, the transactions, occurrences or agreements to which they may refer (***Watson v. Esposito***, ***supra***).

It bears noting that the plaintiff has not interposed claims of wrongdoing based upon Rechler's acquisition of his book collection; nor has he alleged that the defendants undertook any special duty of care in assisting Rechler acquire those books, or set forth specific allegations identifying acts of wrongdoing committed by the defendants with respect to the Christies book sales. Rather, the plaintiff's claims, including those in his amended complaint, focus principally on the 137 lots which were entrusted to the defendant after the 2002 Christies auction was completed.

It is settled that the Court possesses broad discretion to limit discovery in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice, and also "to determine what is 'material and necessary' as that phrase is used in CPLR 3101(a)" (***Auerbach v. Klein***, ***supra***; ***Bell v. Cobble Hill Health Center, Inc.***, 22 AD3d 620, 622; *see*, ***Pacheco v. New York City Housing Authority***, 48 AD3d 534).

Upon the exercise of that broad discretion, the Court agrees that a significant number of the demands and interrogatory requests attach "undue attention" to collateral matters" and/or are overly broad, burdensome, and lack adequate specificity in identifying the materials, documents and items requested. To the extent that certain demands may be more reasonable in scope, or alternatively, that more narrowly framed requests might elicit properly discoverable matter, it is settled that Courts are not obligated to prune defective demands or requests (*see*, ***Latture v. Smith***, 304 AD2d 534, 536).

The Court has considered the parties' remaining contentions and concludes that they do not support an award of relief beyond that expressly granted above.

Accordingly, that branch of the motion by the defendants-counterclaim plaintiffs,

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Glenn Horowitz Bookseller, Inc., which is for a protective order with respect to stated discovery demands is **granted** in accordance herewith, and the motion is otherwise **denied**; and the cross motion by the plaintiff Dennis Sprung, as Executor of the Estate of Roger Rechler is **granted** to the extent that the amended complaint in the form attached to the plaintiff's cross motion shall be deemed served, and the plaintiff's cross motion is otherwise **denied**; and the defendants' time to serve an amended answer shall be enlarged until 20 days after service upon them of a copy of this decision and order.

A Preliminary Conference has been scheduled for May 18, 2010 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated March 1, 2010

J.S.C.

ENTERED
MAR 08 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE