

**AQ Asset Mgt. LLC v Levine**

2014 NY Slip Op 30341(U)

February 4, 2014

Sup Ct, NY County

Docket Number: 652367/2010

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 652367/2010
AQ ASSET MANAGEMENT
vs
LEVINE, MICHAEL
Sequence Number : 024
PARTIAL SUMMARY JUDGEMENT

INDEX NO.
MOTION DATE 10/22/13
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits
Answering Affidavits — Exhibits
Replying Affidavits

No(s). 789-821, 823-82
No(s). 89-906
No(s). 942-948

Upon the foregoing papers, It is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/4/14

SHIRLEY WERNER KORNREICH
J.S.C. [Signature]

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
AQ ASSET MANAGEMENT LLC (as Successor to Artist  
House Holdings Inc.), ANTIQUORUM, S.A., ANTIQUORUM  
USA, INC. and EVAN ZIMMERMANN,

Plaintiffs,

Index No. 652367/2010

-against-

**DECISION & ORDER**

MICHAEL LEVINE, HABSBERG HOLDINGS LTD.  
and OSVALDO PATRIZZI

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

On this motion, defendants Habsburg Holdings Ltd. (Habsburg) and Osvaldo Patrizzi (collectively, defendants) move for: 1) partial summary judgment on the Eighth Counterclaim of their amended answer; and 2) a preclusion order against plaintiffs AQ Asset Management LLC, Antiquorum, S.A., Antiquorum USA, Inc. (Antiquorum USA) and Evan Zimmermann. Plaintiffs oppose.

*I. Background*

By a stock purchase agreement (the SPA) dated December 9, 2005 (affidavit of Michael Haskel, sworn to on June 10, 2013 [Haskel moving affidavit], exhibit A), as later amended by an addendum dated January 13, 2006 (*id.*, exhibit B [the Addendum]), Habsburg agreed to sell to Patrizzi and Artist House Holdings, Inc. (Artist House) its stake in an auction house for vintage time pieces known as “Antiquorum,” also referred to here as “the Company”, made up of a number of entities (SPA § 1.1; Addendum ¶ 4; affidavit of Osvaldo Patrizzi, sworn to Mar 28, 2012, ¶ 11). Patrizzi was the founder and chief executive officer of Antiquorum. However, the

SPA stated that Habsburg owned all 2,100 shares of Antiquorum S.A.<sup>1</sup> and 25 of the 49 shares of Antiquorum USA (SPA, schedule 3.3). Antiquorum S.A., in turn, owned the shares of Antiquorum Auctioneers (Hong Kong) Ltd., while Antiquorum S.A. and Antiquorum USA, between them, owned 65% of C2C Time, Inc (*id.*). The minority stake in these companies, to the extent there was one, allegedly was held by Patrizzi (*id.*). According to the contract, both Habsburg and Patrizzi were to deliver *all* of their shares in the aforesaid entities to an escrow agent (Michael Levine), to whom Artist House would also deliver \$30 million, in installments. Once the final installment from Artist House was received, the escrow agent would release 50% of the outstanding shares of the various entities to Artist House (Addendum ¶ 3). The remaining 50% of the shares were to be held in escrow “for the benefit of Osvaldo Patrizzi . . . or his designee,” to be released to him after “Patrizzi fulfills his obligations in full under the Consulting Agreement,” pursuant to which Patrizzi had agreed to continue serving as CEO and chairman of Antiquorum for at least three years (*id.* at ¶ 4). In other words, Habsburg was to be bought out in cash, and going forward, the Company, under Patrizzi’s management, was to be evenly split between Artist House and Patrizzi (or his designee), with Patrizzi, as chairman, holding a tie-breaking vote.

The SPA provided that the Company’s accrued accounts receivable and liabilities, and the cash and securities on hand at the time of closing, would remain the property or responsibility of the Company (SPA § 2.3). However, as for the inventory on hand, the contract provided the following:

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<sup>1</sup> Defendants now claim that their representation in this regard was false, and that in fact Patrizzi owned 20% of Antiquorum S.A. at the time (amended answer to cross-claim, ¶ 40).

Simultaneously with the execution of this Agreement, [Antiquorum S.A.] will execute a promissory note to a third party which will obligate [Antiquorum S.A.] to pay to the third party the sum of Sixteen Million Swiss Francs (CHF 16,000,000) . . . within six months from the date thereof. The parties hereto understand and agree that the said sum shall be paid from the sale of inventory on hand and owned<sup>2</sup> by the Company as of the date of this Agreement. Patrizzi shall ensure that the said inventory is offered for sale either at auction or privately, prior to the due date of the said promissory note (*id.* at § 2.4).

The intended beneficiary of the note was Habsburg (transcript, Oct 17, 2013, 9). No such note was ever executed (*id.* at 10).

Some time after the funds and shares were delivered into escrow, an amended version of the stock purchase agreement was executed by Artist House, Patrizzi and Habsburg. That agreement contained the following, somewhat different provision concerning the inventory (additions to the original agreement are shown in bold):

Simultaneously with the execution of this Agreement, **and in order to pay the book value of inventory on hand and owned by the Company to the Stockholders**, [Antiquorum S.A.] will execute a promissory note to a third party which will obligate [Antiquorum S.A.] to pay to the third party the sum of Sixteen Million Swiss Francs (CHF 16,000,000) . . . within six months from the date thereof. **Alternatively, Patrizzi may become personally responsible for payment of the said CHF 16,000,000 to any Stockholder which is entitled thereto.** The parties hereto understand and agree that the said sum shall be paid from the sale of inventory on hand and owned by the Company as of the date of this Agreement. Patrizzi shall ensure that the said inventory is offered for sale either at auction or privately, prior to the due date of the said promissory note. **Any funds received in excess of the said CHF 16,000,000 shall be the exclusive property of Patrizzi or his designees** (Haskel moving affidavit, exhibit Y, § 2.4).

Defendants deny that the amended stock purchase agreement is legally valid (amended answer to cross-claim, ¶ 37; amended counterclaims ¶¶ 29–31; *but see* affidavit of Nicholas P. Lingard, Oct

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<sup>2</sup> Defendants now claim that this inventory was actually owned by them and merely held by Antiquorum S.A. (amended answer to cross-claims, ¶ 50).

3, 2011, exhibit A).

In the summer of 2007, about a year and a half after closing, Patrizzi and the Company parted ways in a less than amicable fashion, and management of Antiquorum was assumed by Artist House. According to defendants, this change in control was achieved in reliance on a document, referred to here as the “Distribution Agreement”, which Artist House claimed allowed Zimmermann to vote half of Patrizzi’s interest. Defendants maintain that Patrizzi’s execution of this document was obtained by misrepresenting its contents to him and seek its rescission (amended counterclaims ¶¶ 32–41, 152–64). The circumstances surrounding this change in control are hotly disputed between the parties.

On May 6, 2013, following plaintiffs’ reply to the original answer, defendants interposed an amended answer pursuant to CPLR 3025 (a). The amended answer contains a number of counterclaims and cross-claims, including a counterclaim for the imposition of a constructive trust on the proceeds of the sale of the aforementioned inventory. On May 31, Plaintiffs moved to dismiss certain counterclaims and did not file a reply. Ten days later, defendants made the instant motion, in which they seek partial money judgment of \$3,699,227.23 on their constructive trust counterclaim, which amount is said to represent the proceeds of the sale of inventory since August 2, 2007, and further request that a constructive trust be imposed on the proceeds of certain inventory items that have yet to be sold. Defendants also move to preclude plaintiffs from introducing any evidence in opposition to this counterclaim. As of the date of this decision, no party depositions have taken place.

## *II. Defendants’ Submissions*

### *Inventory List*

Defendants have submitted a June 7, 2007 email from Leo Verhoeven, a representative of Habsburg, to Michael Levine with an attached spreadsheet (Haskel moving affidavit, exhibit D). In the email, Verhoeven states that the attachment shows “all inventory objects that were in possession of Antiquorum S.A. on December 9, 2005.” He adds that “[t]he funds that were liberated by the inventory sales has [sic] been used in the day to day business of the company and some new inventory has been purchased therewith” (*id.*). No affidavit from Verhoeven or anyone else was submitted with the motion explaining the spreadsheet.

*Plaintiff's Inventory Report*

As part of the discovery in this action, plaintiffs produced to defendants their own report concerning the disposition of items on Verhoeven's spreadsheet that appeared from that list to have been unsold as of the date of that email (*id.*, exhibit J). The report noted which items on that list had been sold, stating the date and location of the sale, as well as the price and the identity of the purchaser.<sup>3</sup> According to the report, a number of items on Verhoeven's list had actually been sold months (or, in some cases, years) prior to the sale of the Company in December 2005,<sup>4</sup> while others, which Verhoeven had reported as unsold as of June 2007, had in fact been sold after closing.<sup>5</sup> While the report indicates that as of March 2013 many of the items

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<sup>3</sup> By the agreement of the parties, the buyer's identity was in many instances redacted from the copy of the document filed and submitted to the court.

<sup>4</sup> See, for example, the entries on Exhibit J for contract numbers 90812-8, 90816-1, 93037-13, 93070-57, 93083-29, 93112-1, 93196-18, 93246-2, 93259-11, 93265-1, 93277-1, 93502-1, 93579-39, 93579-108, 93579-112, 93587-4, 93591-1, 93764-9, 96505-4, 96511-2, 96516-2, 96523-1, 96523-12, 96537-1, 96555-1, 96566-4 and 96569-3.

<sup>5</sup> Compare, for example, the entries for contract numbers 91878-5, 93069-19, 93219-1, 93321-1, 93587-26, 96522-1 and 96537-8 in Exhibit J with the entries for those items on Exhibit D.

on Verhoeven's list remained unsold, other items are simply marked with question marks, and still others are reported separately as being "contracts with no records."

*Report of Sudan Partner AG*

Defendants have also submitted an audit of Antiquorum S.A. prepared by a Swiss accounting firm named Sudan Partner AG, covering the fifteen month period ending March 31, 2007 (*id.*, exhibit E). The report itself was prepared in November 2007, some months after Patrizzi's departure from the Company. According to the balance sheet approved by the report, Antiquorum S.A. had approximately CHF 20 million worth of inventory on hand as of March 31, 2007. While the balance sheet compares the figures for March 2007 with those for December 2005, the auditors are careful to note that they were not the approved auditors for 2005 and did not fully audit the financial statements for that year. They, therefore, explicitly disavow any responsibility for the opening balances as of January 1st, 2006, and bluntly note that "[m]isstatements of the financial statements 2005 are possible" (Exhibit E). The auditors also state that, "[a]s far as we know, the consciousness of management for internal control in the past was low" and that "[i]n the past few years the physical year end inventory was not sufficiently documented and we do not know how effective [sic] and serious [sic] it was done."

*Affidavit of Osvaldo Patrizzi*

In his affidavit (sworn to on June 4, 2013),<sup>6</sup> Patrizzi discusses two items from Verhoeven's list, item number 93305-1, a clock first owned by Josephine Bonaparte, and item

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<sup>6</sup> The court is uncertain what probative value, if any, should be assigned to this English-language affidavit, given that Patrizzi has sworn (Patrizzi affidavit, Mar 28, 2012, ¶ 18) that he does not fully know how to read that language, a statement upon which this court has relied (decision & order, Mar 28, 2013, 12-13).

number 99999-999, described on Verhoeven's list simply as "pistolets", but which Patrizzi avers was "a set of enamel and gold singing bird pistols." Plaintiffs reported the clock as having been sold to Patrizzi in July 2007 for CHF 1,034,450. Patrizzi confirms that this is true, but adds that after that sale Antiquorum prevented him from taking possession of the clock and resold the clock to a third party in 2008. Patrizzi and the other buyer ultimately agreed to become co-owners of the item, and it was later sold in London for 700,000 pounds sterling, which were split between Patrizzi and the other owner. Furthermore, while plaintiffs reported the "pistolets" as being a "contract with no record," Patrizzi claims that this item was sold at a Christie's auction in 2011 for \$5.8 million (Haskel moving affidavit, exhibit M).<sup>7</sup>

### *III. Plaintiffs' Submissions*

#### *Affidavit of Evan Zimmermann*

Zimmermann avers that he is currently the president and CEO of Antiquorum S.A. and Antiquorum USA (affidavit of Evan Zimmermann, sworn to on July 26, 2013, ¶ 1). He states that from 2005 to the middle of 2007 Verhoeven and Patrizzi were in complete control of Antiquorum S.A., "including the maintenance of its financial and inventory records" (*id.* at ¶ 5). He further states that at the time of Patrizzi's departure, Antiquorum S.A. had a "negative cash position of over CHF 6 million," despite having been provided by Artist House with \$10 million of working capital as part of the stock transaction a mere year and a half before (*id.* at ¶ 9). As to Josephine Bonaparte's clock, Zimmermann avers that "[t]o the best of [Antiquorum S.A.]'s knowledge," Patrizzi "paid" for the clock by giving himself a credit,<sup>8</sup> not with cash (*id.* at ¶15).

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<sup>7</sup> The auction date of 2012 (Patrizzi affidavit, June 4, 2013, ¶ 10) appears to be an error.

<sup>8</sup> What this supposed credit was against is unclear.

He further states that the “pistolets” were sold for \$1 million in 2008 through a private treaty arranged by Yo Tsukuhara, the Artist House representative who assumed the CEO position at Antiquorum after Patrizzi’s departure, and avers that Antiquorum S.A. “is attempting to recover any records it has concerning this transaction and will provide them if they exist” (*id.* at ¶ 17).

Zimmermann has submitted a report by PricewaterhouseCoopers (PwC), dated August 21, 2007, in which that firm attempted to estimate the value of the inventory on hand at that time (Zimmermann affidavit, exhibit 5). According to the report, the most optimistic estimate of the current market value of the Company’s inventory was approximately CHF 16 million (*id.*). The report mentions that determining the precise amount of inventory actually held by the Company presented difficulties, as watches were apparently being discovered in various safes, without reference numbers or other records (*id.*).

*Affidavit of Bruno Ayanian*

Plaintiffs have also submitted an affidavit from Bruno Ayanian, who states that he is the chief financial officer of Antiquorum USA (affidavit of Bruno Ayanian, sworn to on July 26, 2013, ¶ 1). Mr. Ayanian avers that he began working with the Company in August 2010, is responsible for the Company’s accounting, and is familiar with the systems used by the Company to track inventory (*id.* at ¶¶ 2–3). He explains that during Patrizzi’s tenure, the inventory management system and the financial accounting system did not automatically reconcile; in other words, the sale of an item was not automatically reflected on the Company’s “books” and had to be manually entered (*id.* at ¶¶ 4–7). This left the inventory data subject to manipulation or human error (*id.*). Mr. Ayanian states that he spent considerable time attempting to find the requested data for the items on Verhoeven’s list, but explains that many items on the list could

not be located and the Company currently “ha[s] no way of confirming when the items were acquired and the exact prices paid for those items. Thus many items on the list have question marks next to them” (*id.* at ¶¶ 10–11).

#### IV. Standard

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). However, if a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept. 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat summary judgment (*Zuckerman*, 49 NY2d, at 562). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

#### V. Discussion

A. *Identity of Inventory at Issue*

Defendants have alleged that “[p]ursuant to the SPA, all of the inventory held by [Antiquorum S.A.] at the time of closing was to be sold” and that *all* proceeds from those sales were to go to Habsburg, Patrizzi or a designee of Patrizzi (amended counterclaims ¶ 14). They claim that they have received no part of those proceeds, whether from sales before or after the change in control (*id.* at ¶ 116). In their eighth counterclaim, they seek the imposition of a constructive trust on the inventory or the proceeds of it. On this motion, defendants argue that on the record presented they are entitled to partial summary judgment for the proceeds of inventory items sold after Patrizzi’s departure, as well as any future proceeds from items that plaintiffs reported as being still unsold.

The motion is denied. To begin, to succeed, defendants must identify the items on hand at the time of the closing of the stock sale and which of those items were sold by the Company subsequent to the change in management. To establish these essential facts, defendant has submitted a spreadsheet which had been attached to the 2007 Verhoeven email. No affidavit from Verhoeven or anyone else with knowledge accompanied the spreadsheet, explaining how it was compiled or even averring that it was accurate. Consequently, setting aside any other issue of whether defendants would, as a matter of law, be entitled to the inventory proceeds, defendants simply have failed to establish what items constituted the “inventory” in question. Defendants attempt to circumvent this problem by arguing that plaintiffs conceded the accuracy of Verhoeven’s compilation when opposing defendants’ motion for a preliminary injunction, when Zimmermann used the list to argue that most of the inventory defendants’ were claiming had been sold while Patrizzi and Verhoeven were managing the Company (affirmation of

Brandon Zlotnick, July 15, 2013, exhibit VV, ¶ 61). This is hardly an admission as to the accuracy of the list. It merely is Zimmerman's claim that based on what inventory existed and the records compiled by defendants (or the lack of such records), the inventory had been sold on defendants' watch. Defendants cannot establish their affirmative burden of proof relying on this hearsay. Hence, defendants' summary judgment motion fails, "regardless of the sufficiency of the opposing papers" (*Ayotte*, 81 NY2d at 1063).

*B. Necessary Elements of Constructive Trust*

Aside from their failure to actually identify the inventory that they believe to be theirs, defendants also have not made out a *prima facie* case entitling them to a constructive trust. According to the only version of the SPA recognized by defendants, Habsburg, which was selling its entire stake in the Company, was to be paid CHF 16 million for the inventory on hand at the time of the reorganization. While Patrizzi, as CEO, explicitly assumed responsibility for seeing that the inventory was sold, the original stock purchase agreement did not give him the personal right to inventory proceeds. The amended answer bases defendants' inventory claim solely on the SPA, without alleging any other promise, written or oral, as a basis for such claim (*see, e.g.*, amended counterclaims ¶¶ 14, 41, 58, 89, 111, 115, 119). Consequently, only defendant Habsburg can state a claim to the inventory proceeds under the current allegations.

Habsburg's remedies at law are defined by the SPA, and its existence bars the assertion of any quasi-contractual claims (*Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d 382, 388-89 [1987]; *see also Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003] [holding that existence

of contract bars unjust enrichment claims even against non-signatories]).<sup>9</sup> The inventory provision imposes no obligation on Artist House, and while it speaks of the issuance of a note by Antiquorum S.A., the company did not sign the contract, though Patrizzi, its CEO and controlling shareholder, did. At law, then, Habsburg has no recourse against plaintiffs, though it may, in fact, have a claim against Patrizzi. Instead, however, apparently more interested in pursuing plaintiffs than Patrizzi,<sup>10</sup> Habsburg, here, has sought equitable relief, in the form of a constructive trust.

Defendants, therefore, argue that all they need to show to obtain a constructive trust on the inventory proceeds is that it was originally agreed and understood by the parties to the transaction that CHF 16 million of those funds were to go to Habsburg. Generally speaking, however, the remedy of constructive trust is designed to prevent a person from enjoying the benefits of property that he possesses due to “some act of egregious unfairness” (*Matter of Liquidation of the New York Agency of and Other Assets of Bank of Credit and Commerce Intl. S.A.* [hereinafter, *Matter of BCCI*], 223 AD2d 184, 190 [1st Dept 1996] citing *Simonds v Simonds*, 45 NY2d 233, 241–42 [1978]). Most often the assets in question have been obtained in the context of a special relationship or a situation where one party has undue influence over another (*see, e.g., Sharp v Kosmalski*, 40 NY2d 119, 121–22 [1976] [“defendant must be charged with an obligation not to abuse the trust and confidence placed in her by the plaintiff”]; *Latham v*

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<sup>9</sup> This principle also bars defendants from proceeding under a cause of action for monies had and received (*Melcher v Apollo Medical Fund Mgt. L.L.C.*, 105 AD3d 15, 27-28 [1st Dept 2013]).

<sup>10</sup> The court here does not address the question of whether the existence of a claim at law bars an equitable claim by defendants (*Boyle v Kelley*, 42 NY2d 88, 91 [1977]; *Bertoni v Catucci*, 117 AD2d 892, 895 [3d Dept 1986]), as the issue has not been briefed.

*Father Divine*, 299 NY 22 [1949] [finding that allegations that defendants prevented decedent from changing will through fraud, undue influence and murder stated claim for constructive trust]). It typically is not a remedy available to sophisticated parties who have entered into arms-length transactions, no matter how disappointed they may be in the results (*see Kalmon Dolgin Affiliates, Inc. v Tonacchio*, 110 AD3d 848, 850–51 [2d Dept 2013]; *Guarino v North Country Mtge. Banking Corp.*, 79 AD3d 805, 807 [2d Dept 2010]; *Wachovia Sec. LLC v Joseph*, 56 AD3d 269, 271 [1st Dept 2008]). Therefore, contrary to defendants’ contentions, a simple showing of unjust enrichment without a demonstration of wrongdoing is insufficient to impose a constructive trust.

*Matter of BCCI, supra*, is illustrative of the principle. There, though the claimant had delivered the required yen to the bank and was due \$32 million under a currency swap, a constructive trust was denied when the swap was interrupted by the bank’s seizure and shutdown (223 AD2d at 187–91). In the words of the Court, “the constructive trust doctrine serves as a ‘fraud-rectifying’ remedy rather than an ‘intent-enforcing’ one” (*Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980]); dashed expectations are not enough to invoke the relief (*see In re First Cent. Fin. Corp.*, 377 F3d 209, 216–17 [2d Cir 2004]). Defendants’ reliance on *Simonds, supra*, in this regard is misplaced, as there, too, the decision to impose the trust rested on the fact that the plaintiff’s former husband wilfully broke the express promise he made to her in their separation agreement and conferred the benefit due to her on his second wife (45 NY2d at 240). The Court in that case noted that there existed “a duty of fairness in financial matters extending even past the separation of the spouses” (*id.* at 242).

Here, Habsburg freely agreed to sell all its shares in the Company to Artist House and Patrizzi. There is no allegation that the relationship between Artist House and Habsburg was anything other than arms-length. Ergo, there is no basis for describing it as one of trust, much less of a fiduciary nature (*see, e.g., HF Mgt. Servs. LLC v Pistone*, 34 AD3d 82, 85 [1st Dept 2006]). The relationship is governed by an explicit contract which required Patrizzi, not Artist House, to act. Artist House's obligation to Habsburg began and ended with tendering \$30 million to Levine. Whatever fiduciary relationship Habsburg may have had with Zimmermann would also appear to be irrelevant, as Zimmermann was not a party to the transaction and was never entrusted by Habsburg with seeing that the inventory was sold. Simply put, it is unclear whether the allegations of the amended answer support a cause of action for constructive trust at all.<sup>11</sup>

To the extent that Habsburg may have a claim, that claim appears to be that Artist House deliberately thwarted its receipt of the inventory monies by engineering Patrizzi's departure from the Company. However, as explained above, to obtain a judgment for constructive trust Habsburg would have to prove that Patrizzi's departure was obtained through fraudulent or egregiously unfair means. While the amended answer alleges that the change in control was brought about by tricking Patrizzi into signing the Distribution Agreement, no evidence has been presented in support of this claim. Defendants' marshaling of various documents or theories in

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<sup>11</sup> While the court previously declined to dismiss this counterclaim (decision & order, Mar. 28, 2013), that decision was based on defendants' original pleadings, which did not repudiate the amended stock purchase agreement. As that agreement apparently granted Patrizzi an interest in the inventory proceeds and alleged that a fiduciary relationship existed between Artist House or Zimmermann and Patrizzi, the court found that dismissal at that stage was inappropriate. The amended pleadings, which make clear that the only defendant with a viable claim to the inventory is Habsburg, may warrant different treatment.

support of their contention that Zimmermann owed a fiduciary duty to one or both of them is ultimately futile without, at the very least, showing that Artist House took advantage of that alleged relationship of trust.<sup>12</sup> For this reason, too, the court finds that defendants have failed to *prima facie* establish a factual basis for judgment on the eighth counterclaim.

*C. Joinder of Issue and Affirmative Defenses*

Moreover, defendants' motion is further deficient in that it was made prior to joinder of issue. "A motion for summary judgment may not be made before issue is joined and the requirement is strictly adhered to" (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985] [citations omitted]). "Because [plaintiff] had not replied to [defendants'] counterclaims, their 3212 motion for summary judgment preceded joinder of issue and was untimely" (*id.*; CPLR 3212 [a]). Part of the reason for this requirement is that a motion for summary judgment must "show that there is no defense to the cause of action" (CPLR 3212 [b]), a determination that cannot be made until plaintiffs' time to assert affirmative defenses has elapsed. By choosing to file an amended answer (which differs substantially from their original pleadings), defendants have given plaintiffs the opportunity to file a new reply, and plaintiffs have until that time to give notice of what affirmative defenses they plan to assert. There is simply no reason for the court to abridge plaintiffs' rights here.

In any case, plaintiffs have noted a number of issues, which, at the time this motion was made, had not been adequately explored in discovery. These include the management of the Company's inventory and inventory records prior to the change in control. This matter is highly

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<sup>12</sup> It is further noted that the evidence presented to show that Zimmermann acted as an attorney for the defendants has already been rejected both by this court and by the Appellate Division as inconclusive (*AQ Asset Mgt. LLC v Levine*, 111 AD3d 245, 257-58 [1st Dept 2013]).

pertinent both to establishing what inventory is actually at issue in the eighth counterclaim (as discussed above) and also possibly to the affirmative defense of unclean hands which plaintiffs asserted in their original reply. Given that Verhoeven and Patrizzi were in control of the Company between the closing of the deal and August 2007 and given the submissions on this motion indicating that they left the Company's records in substantial disarray, plaintiffs have sufficiently demonstrated a need for further discovery (*see* CPLR 3212 [f]).

*D. Request for Preclusion*

Finally, defendants seek an order pursuant to CPLR 3126 *precluding* plaintiffs from introducing *any* defense to their eighth counterclaim, contending that plaintiffs have failed to adequately fulfil their obligation to produce documents relating to the inventory at issue. Specifically, defendants requested records showing the disposition of the items on Verhoeven's list; plaintiffs were directed to produce those records by March 29, 2013. Plaintiffs only produced the above-discussed inventory report, without any supporting documentation. In addition to faulting plaintiffs for not producing supporting documents, defendants, through Mr. Patrizzi's remarkably fluent English-language affidavit, question the accuracy of the report. In response, plaintiffs note that prior to making this motion on June 10, 2013, defendants never asked them about the missing documentation, nor did they raise the issue with the court during a status conference held on April 24, 2013. They further argue (and defendants concede) that since the filing of this motion they have been providing documents to defendants as they are located.

As this court has previously had occasion to note (Oct 24, 2013 order), the court rules require that parties meet and confer concerning any discovery issues, and if they fail to resolve the issues, to request a conference with the court (Uniform Rules for Trial Cts [22 NYCRR] §

202.70, Rules 13 & 14). This was not done here prior to the making of this motion. Moreover, after the court indicated at oral argument that defendants' motion to preclude would be denied, counsel proceeded to invent a deadline for final production of these inventory records and falsely attribute the same to the court (*compare* letter dated October 21, 2013 [NYSCEF Doc. No. 1058] *with* transcript, Oct 17, 2013). This conduct verges on the sanctionable. At the very least, it is sufficient to demonstrate bad faith and warrant denial of this motion (22 NYCRR § 202.7 [a]; *Hernandez v City of New York*, 100 AD3d 433, 434 [1st Dept 2012] [citations omitted]). Further, given that no party depositions have been held as yet and that plaintiffs have been producing inventory documents on an ongoing basis, there is little evidence of either bad faith on plaintiffs' part or prejudice to defendants, and so preclusion is not warranted (*id.* citing *Delgado v City of New York*, 47 AD3d 550 [1st Dept 2008]; *Brown v United Christian Evangelistic Assn.*, 270 AD2d 378, 379 [1st Dept 2000]).

V. *Conclusion*

In sum, this motion should never have been brought. It lacks any factual basis and badly misinterprets the law. Frivolous motions such as this one unconscionably wastes the court's time and resources and drain the parties' money. Accordingly, it is

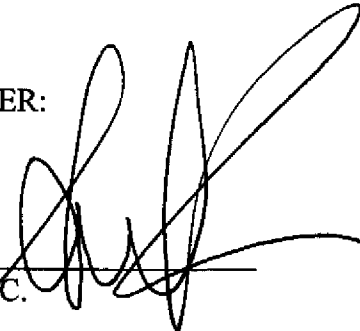
ORDERED that the motion of defendants Habsurg Holdings Ltd. and Osvaldo Patrizzi for partial summary judgment and for the preclusion of defenses to its counterclaim is denied; and it is further

ORDERED that by February 14th, 2014, defendants shall submit to the court a letter of no more than two pages, single-spaced, explaining why this motion was not frivolous and does

not warrant the imposition of sanctions of \$7,000.

Dated: February 4, 2014

ENTER:

  
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J.S.C.