

AQ Asset Mgt. LLC v Levine
2018 NY Slip Op 31046(U)
May 30, 2018
Supreme Court, New York County
Docket Number: 652367/2010
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 54

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 AQ ASSET MANAGEMENT LLC (as Assignees of
 Artist House Holdings, Inc.), ANTIQUORUM, S.A.,
 ANTIQUORUM USA, INC., and EVAN ZIMMERMAN,

Index No.: 652367/2010

DECISION & ORDER

Plaintiffs,
 -against-

MICHAEL LEVINE (in his capacity as Escrow Agent),
 HABSBURG HOLDINGS LTD., and OSVALDO
 PATRIZZI,

Defendants.

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 SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 056, 057, and 058 are consolidated for disposition.

I. Introduction

This case has a long and tortured history.¹ Summary judgment motions were decided and appealed. All that is left prior to trial is expert discovery. Unfortunately and unsurprisingly, however, the parties are unable to agree on which causes of action survive. As a result, the instant motions were filed on February 26, 2018, seeking clarity.

Defendants Osvaldo Patrizzi and Habsburg Holdings, Ltd. (collectively, the Patrizzi Defendants) move for an order “identifying the remaining claims for trial.” Seq. 056. Plaintiffs, AQ Asset Management LLC (AQAM), Antiquorum, S.A. (the Company), Antiquorum USA,

¹ “The Court is well-aware of the tortured history of this now seven-year-old action, in which [prior to the filing of the instant motions,] some 2680 documents have been filed, 55 motions have been made, eight appeals have been prosecuted.” Dkt. 2712 at 1 (References to “Dkt.” followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system). “After all of that, it is not surprising that the parties cannot even agree on what remains to be tried in this case.” *Id.* at 2; see *AQ Asset Mgmt. LLC v Levine*, 111 AD3d 245 (1st Dept 2013) (*AQAM I*); *AQ Asset Mgmt. LLC v Levine*, 119 AD3d 457 (1st Dept 2014); *AQ Asset Mgmt. LLC v Levine*, 128 AD3d 620 (1st Dept 2015); *AQ Asset Mgmt. LLC v Levine*, 143 AD3d 570 (1st Dept 2016) (*AQAM IV*); *AQ Asset Mgmt. LLC v Levine*, 154 AD3d 430 (1st Dept 2017) (*AQAM V*).

Inc. (Antiquorum USA), and Evan Zimmerman, seek like relief and move for renewal of their prior summary judgment motion. Seq. 057. Defendant Michael Levine filed a similar motion, though he styles it as one *in limine*. Seq. 058. Plaintiffs and the Patrizzi Defendants filed opposition papers on March 26, 2018. Levine did not.

There are three stakeholders in this action: (1) plaintiffs, who assert claims against Levine and the Patrizzi Defendants; (2) Levine, who asserts counterclaims against plaintiffs; and (3) the Patrizzi Defendants, who assert counterclaims against plaintiffs and cross-claims against Levine. The court will not extensively address all of the claims, which have been the subject of numerous decisions of this court and the Appellate Division. Simply put, “[t]his action arises out of the January 2006 corporate restructuring of a group of entities involved in the auctioning of fine time pieces, and the change in leadership which occurred some 18 months later.” *See* Dkt. 2710 at 4. Principally at issue is a 2005 contract (the SPA) governing the sale of the Company’s stock to a predecessor of AQAM (AH) for, *inter alia*, \$30 million plus the proceeds of at least 16 million Swiss francs (CHF) to be derived from the sale of the Company’s inventory of watches (the Inventory). A major issue in the case is what happened to the Inventory, which is the subject of accounting claims.

Confusion allegedly arises due to the revival of a number of dismissed claims by the Appellate Division in *AQAM V*, issued on October 3, 2017, modifying the court’s July 15, 2016 summary judgment decision. Dkt. 2608 (the July 2016 Decision). The July 2016 Decision is a 62-page written opinion that extensively addressed the underlying allegations, record evidence, and the parties’ competing claims. At the end of the opinion, the court stated that four categories of defendants’ claims remained for trial, enumerated as follows:

1. the tort counterclaims and cross-claims relating to Zimmermann’s votes as a shareholder and director during the 2007 Meetings, that resulted in Defendants’ ouster, as set forth in Discussion Section D [of the decision];
2. the cross-claims against Levine as Escrow Agent relating to the \$300,000 Karastir Payment, and other accounting cross-claims against Levine as set forth in Discussion Sections E and H;
3. the counterclaim against [AQAM] for breach of the Consulting Agreement solely to the extent of monies owed to Patrizzi due to his termination before November 18, 2008, as set forth in Discussion Section F; and
4. Levine’s first cross-claim against Defendants, stemming solely from Interpleader, for fees and costs as set forth in Discussion Section J.

July 2016 Decision at 61-62.²

In *AQAM V*, the Appellate Division modified the July 2016 Decision:

[1] to deny plaintiffs’ motion as to the inventory sale proceeds counterclaims based on fraud and fiduciary duty, [2] the counterclaim for breach of the consulting agreement, [3] and the counterclaim for an accounting of inventory sale proceeds as against [the Company], [4] and to grant Levine’s motion for summary judgment dismissing Habsburg and Patrizzi’s cross claims based on fraud and breach of fiduciary duty in connection with Levine’s drafting of an agreement [the SPDA] between Patrizzi and Zimmermann.

AQAM V, 154 AD3d at 430-31 (brackets added); *see id.* at 431 (holding that balance of July 2016 Decision was “otherwise affirmed.”).

II. *Moving Briefs*

A. *The Patrizzi Defendants’ Moving Brief (Dkt. 2683)*

The Patrizzi Defendants contend that plaintiffs have only two claims remaining to be tried. Those are the second cause of action against Levine for a declaration that he must release certain stock shares from escrow to AQAM, and the fifth cause of action against Habsburg for allegedly failing to deliver certain shares into escrow with Levine. *See* Dkt. 2683 at 15.

² As discussed herein, there is no dispute regarding the scope of plaintiffs’ remaining claims.

In regard to Levine's counterclaims, the Patrizzi Defendants note, his first counterclaim sought "a declaration directing him where to release the funds and stock shares he was holding in escrow pursuant to the SPA" and was decided in the Patrizzi Defendants' favor. *See id.*; *AQAM I*, 111 AD3d at 256 ("The SPA was unconcerned with who technically owned the entities. Rather, it recognized that Habsburg and Patrizzi controlled the entities and that the instrument had the sole purpose of compensating them for relinquishing shares in the entities to AH."). They contend Levine's second counterclaim "concerning Levine's entitlement to attorneys' fees remains for trial but subject to this Court's previous conclusion, undisturbed on appeal that '[t]here is no evidence that the interpleader commenced by Levine was the type of action for which § 13.6 entitled him to recover attorney's fees and expenses . . . [because] Levine was not acting as a neutral stakeholder seeking to resolve a conflict between the parties to the contract.'" *See* Dkt. 2683 at 15, quoting July 2016 Decision at 60-61.

Additionally, in regard to 16 counterclaims they asserted against plaintiffs and 18 cross-claims against Levine (Dkt. 1911), they contend that "seven of [their] counterclaims have been dismissed in their entirety and there is no dispute about their exclusion from trial."³ *See* Dkt. 2683 at 16. "Likewise, six cross-claims have either been resolved as a matter of law or

³ The seven dismissed counterclaims are: (1) the fourth, against Zimmermann for constructive fraud; (2) the sixth, against AQAM for aiding and abetting breach of fiduciary duty; (3) the seventh, against the Company and Zimmermann for constructive trust; (4) the eighth, against Zimmermann for an accounting; (5) the ninth, against Zimmermann for an accounting; (6) the thirteenth, against plaintiffs for declaratory judgment; and (7) the sixteenth, against plaintiffs for replevin. *See* Dkt. 2683 at 16 n.4. That said, as noted above, the Patrizzi Defendants contend that eight counterclaims remain. This adds up to 15. There are, however, 16 total counterclaims. For reasons that are unclear, the Patrizzi Defendants do not address the eleventh counterclaim for an accounting from Antiquorum USA. Regardless, as plaintiffs correctly explain, the eleventh counterclaim was dismissed in *AQAM V*. *See* Dkt. 2710 at 15; Dkt. 2714 at 5.

dismissed.”⁴ *Id.* The Patrizzi Defendants contend eight of their counterclaims remain and seek to go to trial on: (1) allegations of fraud against Zimmerman concerning (a) his drafting of the [SPDA], which was “modified only to the extent of dismissing claims against Levine for fraud ‘in connection with Levine’s drafting of an agreement between Patrizzi and Zimmerman’” [see Dkt. 2673 at 16, quoting *AQAM V*, 154 AD3d at 430-31]; and (b) \$2 million of the inventory proceeds, which was reinstated in *AQAM V*, 154 AD3d at 431; (2) breach of the December 9, 2005 consulting agreement (the Consulting Agreement) against AQAM, which was reinstated in full in *AQAM V*, 154 AD3d at 432; (3) breach of fiduciary against Zimmerman, which “survives pursuant to [*AQAM V*] on the same basis as the [Patrizzi Defendants’] fraud claims (i.e., excluding the SPDA claim, but including all other claims, including all Inventory Claims), with the exception of the Secret Self-Dealing Claim to the extent it pertains to Zimmermann’s alleged broker fee, which this Court dismissed as discussed at [page] 60 of the [July 2016] Decision” [see Dkt. 2683 at 17]; (4) aiding and abetting Levine’s fraud; (5) an accounting against the Company, but only, pursuant to *AQAM V*, regarding the Company’s Inventory sale proceeds; (6) rescission of the SPDA on the ground of illegality; (7) Zimmerman’s aiding and abetting Levine’s breach of fiduciary duty; and (8) fraudulent concealment, but only relating to the Inventory proceeds and only as against Zimmerman and Antiquorum USA.

Finally, the Patrizzi Defendants contend that 12 of their cross-claims against Levine survive: (1) the third, for fraud “to the same extent as the fraud claim against Zimmermann”, i.e., “the only portion of the claim that does not survive is to the extent it relates to the drafting of the

⁴ The Patrizzi Defendants do “not contest that [6 of the 18] cross-claims have either been decided or dismissed and do not remain for trial: (1) the first, for declaratory judgment; (2) the second, for declaratory judgment; (3) the sixth, for contribution; (4) the eighth, for constructive fraud; (5) the tenth, for contribution; and (6) the twelfth, for fraudulent concealment.” See Dkt. 2683 at 16 n.5.

SPDA.” [see Dkt. 2683 at 18];⁵ (2) the fourth, for breach of fiduciary duty relating “to the Ouster Claim, the Escrow Claim, the Karastir Claim, and the Inventory Proceeds Claim” [see *id.* at 19]; (3) the fifth, for an accounting; (4) the seventh, for breach of fiduciary duty concerning the Karastir Claim, but not the SPDA Claim; (5) the ninth, for aiding and abetting Zimmerman’s breach of fiduciary duty;⁶ (6) the eleventh, for conversion, but only to relating to the \$2 million subset of the Inventory proceeds; (7) the thirteenth, for breach of fiduciary duty with respect to the overall scheme with Zimmerman, except for the SPDA Claim; (8) the fourteenth, for breach of Levine’s fiduciary duty as an attorney in connection with his overall scheme with Zimmerman; (9) the fifteenth, for breach of fiduciary duty concerning Levine’s handling of the Patrizzi Defendants’ funds; (10) the sixteenth, for breach of fiduciary duty concerning the stock shares that were entrusted to Levine; (11) the seventieth, for breach of fiduciary duty based on Levine “interpreting the Stock Sale agreements in a manner unfavorable to [the Patrizzi Defendants], thereby allowing plaintiffs oust [the Patrizzi Defendants] from the Company, and to assert their Clawback Claim.” [see *id.* at 20];⁷ and (12) the eighteenth, for breach of fiduciary duty relating to the \$2 million subset of the Inventory proceeds.

⁵ The Patrizzi Defendants further explain why “[t]he fraud claim against Levine also includes the Karastir Claim in full.” *See* Dkt. 2683 at 18-19.

⁶ The parties agree with respect to all aiding and abetting claims that where the underlying claim for breach of fiduciary duty was dismissed, the aiding and abetting claim also has been dismissed. *See, e.g.*, Dkt. 2714 at 9.

⁷ The Patrizzi Defendants note that “although the Appellate Division ultimately ruled in [their favor] and rejected the Clawback Claim, [they] were damaged in that they were forced to incur significant expense to vindicate their position, and therefore maintain their Legal Fee Claim.” *See* Dkt. 2683 at 20. However, in their opposition brief, they concede “that this claim has been dismissed.” *See* Dkt. 2713 at 11 n.2.

B. Plaintiffs' Moving Brief (Dkt. 2710)

"Plaintiffs do not understand there to be a dispute as to what claims set forth in [their] Complaint remain to be tried." *See* Dkt. 2710 at 4. However, plaintiffs and the Patrizzi Defendants "have a dispute regarding the extent to which [the Patrizzi Defendants' counterclaims] against Plaintiffs remain to be tried." *See id.* That said, "Plaintiffs take no position regarding the extent to which the claims asserted by [the Patrizzi Defendants against Levine], and by Levine against [the Patrizzi Defendants], remain to be tried." *See id.*⁸

Plaintiffs agree with the Patrizzi Defendants that eight of the Patrizzi Defendants' counterclaims, discussed above, survive *AQAM V*. Plaintiffs' only dispute is whether, at this juncture, the court should grant renewal of their summary judgment motion and further winnow these remaining claims. For instance, plaintiffs argue that based on the dismissal of the fraud claims asserted against Levine relating to the execution of the SPDA in *AQAM V*, the court should also dismiss all fraud claims relating to the execution of the SPDA. *See* Dkt. 2710 at 11-12. Plaintiffs proffer other similar arguments regarding claims they feel warrant dismissal based on the holdings in *AQAM V*. The court will not reach all of these arguments, which could have been made to this court and the Appellate Division on the prior motions. To the extent such arguments were not made, or were not adjudicated in plaintiffs' favor, it is too late to assert them. *See Brill v City of New York*, 2 NY3d 648, 653 (2004) (where there is no good cause for

⁸ *See also id.* ("Plaintiffs note only that, to the extent [the Patrizzi Defendants] assert claims against Plaintiffs for aiding and abetting Levine's purported fraud and breach of fiduciary duty, those claims against Plaintiffs can only survive to the extent that any claims for fraud and breach of fiduciary duty survive against Levine.").

late summary judgment motion, case should proceed to trial, “where a motion to dismiss after plaintiff rests or a request for a directed verdict may dispose of the case during trial.”⁹

Nonetheless, two issues warrant clarification. *First*, as discussed further herein, there is no question that the validity and enforceability of the SPDA has been established, and, therefore, all claims to the contrary (or premised on the contrary) are infirm. *Second*, plaintiffs’ position that the Company cannot be compelled to provide an accounting because it is not in a fiduciary relationship with the Patrizzi Defendants is untenable. *See* Dkt. 2710 at 15. It is undisputed that an accounting claim against the Company has been pleaded and survived summary judgment. Plaintiffs’ claim that there is a triable issue of fact regarding the existence of a fiduciary relationship and that the Company can only be compelled to account upon such a finding. *See Royal Warwick S.A. v Hotel Representative, Inc.*, 106 AD3d 451, 452 (1st Dept 2013) (“Plaintiff’s claim for an accounting cannot be maintained in the absence of a fiduciary relationship between plaintiff and defendants.”); *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 (1st Dept 1997) (citation omitted) (“The right to an accounting is premised upon the existence of a confidential or fiduciary relationship.”). As discussed below, the Patrizzi Defendants correctly aver that since the Appellate Division held that their fraud and fiduciary duty claims based on the accounting cause of action must proceed to trial, it is the accounting itself, and not simply a determination regarding their threshold right to one, that must be tried.¹⁰ Hence, the Company must provide an accounting, and objections to the accounting will be adjudicated at trial.

⁹ The court agrees with the Patrizzi Defendants that renewal under CPLR 2221(c) is not proper. *See* Dkt. 2713 at 5. Likewise, if plaintiffs felt the Appellate Division did not go far enough in their dismissal of certain claims, they could have moved for reargument. This court will not second-guess the Appellate Division.

¹⁰ Were this not the case, the fraud and fiduciary duty claims that turn on the accounting, which were expressly revived by the Appellate Division, could not be tried. To the extent the Patrizzi

*C. Levine's Moving Affidavit*¹¹ (Dkt. 2712)

Levine explains that from his “personal perspective”, “there are only two remaining claims involving me: whether I properly made and accounted for disbursements from an escrow account, and the amount of legal fees to which I am contractually entitled to recover from [the Patrizzi Defendants].” See Dkt. 2712 at 2. Levine takes no position on the remaining claims between plaintiffs and the Patrizzi Defendants.

According to Levine:

the Appellate Division affirmed this Court’s dismissal of all of the cross claims that this Court dismissed as against me in [the July 2016 Decision], affirmed the dismissal by this Court of the aiding and abetting breach of fiduciary duty claims related to my and Zimmermann’s “interpretation” of contracts, and affirmed the dismissal of claims regarding my release of the \$2 million that Antiquorum had deposited into escrow and that I returned to Antiquorum. As to the remaining classes of cross-claims against me that this Court ruled survived summary judgment - to wit, cross-claims, and portions thereof, that are based upon the provisions of the SPDA that gave Zimmermann an immediate right to vote half of Patrizzi’s stock – the Appellate Division clearly eliminated all of those. **Thus, after [AQAM V], all that was left as against me were the claims related to the accounting and the Karastir payment.**

Dkt. 2712 at 11 (emphasis added; paragraph breach omitted). In sum, Levine contends that there are only three claims left for him to defend: “(i) Whether Defendants received all of the money they are due from me as Escrow Agent, and whether I improperly took money from the escrow

Defendants emphasize the supposed lack of a fiduciary relationship with the Company (and overlook the fiduciary responsibilities of an escrow agent), they ignore the case law that permits an equitable accounting under “other special circumstances.” See *Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 214 (1st Dept 1990); see *Glassman v Weinberg*, 154 AD3d 407, 409 (1st Dept 2017) (holder of escrow funds has fiduciary duty). Here, where it was the Company’s Inventory that would be used to generate proceeds payable under the SPA, such circumstances warrant an accounting to determine what happened to the Inventory and its proceeds.

¹¹ Levine did not submit a brief.

account for my personal use; (ii) Whether the Karastir disbursements were authorized and proper; and (iii) How much I am entitled to as attorneys' fees from [the Patrizzi Defendants].”
See id. at 11-12.

Levine also expresses his intention to file another motion for summary judgment. He cannot do so. By order dated January 9, 2018, the court set a deadline of February 26, 2018 for the parties to file the instant motions and also for Levine to move for summary judgment on all claims reinstated by the Appellate Division in *AQAM IV*. *See* Dkt. 2680. Since *AQAM IV* was issued in October 2016, after this court had decided the parties' summary judgment motions in July 2016, the court found there to be good cause for Levine to file a late summary judgment motion. Now that Levine has chosen not to file his summary judgment motion by the February 26 deadline, he is precluded from doing so. *Brill*, 2 NY3d at 653; *see Encore I, Inc. v Kabcenell*, 160 AD3d 450 (1st Dept 2018), citing *Freire-Crespo v 345 Park Ave. L.P.*, 122 AD3d 501, 502 (1st Dept 2014).

III. *Opposition Briefs (Dkts. 2713 & 2714)*¹²

The Patrizzi Defendants' opposition begins with the refreshing statement that “[f]or once in the long history of this case, [the Patrizzi Defendants] and plaintiffs seem to agree on more than they disagree about.” *See* Dkt. 2713 at 4. Plaintiffs agree that the Patrizzi Defendants' “fraud claims, in large measure, survive for trial including their overall claim that Zimmermann and Levine conspired to wrongly oust [the Patrizzi Defendants] from the Company and deprive them of the benefits of the Stock Sale.” *Id.* “Plaintiffs also do not dispute that [the Patrizzi Defendants'] claim to 16 million CHF in Inventory Proceeds survives for trial, subject to [the Patrizzi Defendants'] ability to prove the Company's inventory.” *Id.* Consequently, [the Patrizzi

¹² It should be noted that Levine did not submit an opposition brief.

Defendants] only address “their few remaining contentions with plaintiffs as to what claims, or portions of claims remain for trial.” *Id.* Specifically, they explain that:

The remaining disputes between [the Patrizzi Defendants] and plaintiffs about which of [the Patrizzi Defendants’] claims remain[] are, for the most part, over discrete sub-issues within claims rather than with entire claims. The issues in dispute are: (i) the **dilution** of Patrizzi’s interest in Company stock (part of [the] second counterclaim); (ii) [the Patrizzi Defendants’] claim to **rescind the SPDA** (part of [the] twelfth counterclaim); and (iii) [the Patrizzi Defendants’] **fraudulent concealment** claim to the extent it relates to Inventory Proceeds (part of [the] fifteenth counterclaim). In addition, although plaintiffs concede that [the Patrizzi Defendants’] **accounting claim** against [the Company] remains for trial to the extent of the Inventory Proceeds, [the Patrizzi Defendants dispute the Company’s] proffered approach to dealing with that claim.

Dkt. 2713 at 5 (emphasis added).

The Patrizzi Defendants also agree with Levine that his only remaining affirmative claim is for his alleged attorneys’ fees from [the Patrizzi Defendants], but subject to the limits in the [July 2016 Decision].” *See id.* at 4. However, according to the Patrizzi Defendants, “to the extent Levine’s submission addresses [the Patrizzi Defendants’] claims against him, he ignores just about everything this Court ruled in the SJ Decision, and what the First Department held in [AQAM V].” *Id.* That is, while the claims asserted against Levine which related to the SDPA were dismissed in AQAM V, the Appellate Division did not displace this court’s holding that there are questions of fact regarding the other claims against Levine. *See id.* at 9. Those surviving claims not only related to Levine’s disbursement of the Patrizzi Defendants’ escrow funds, but also his role in the Patrizzi Defendants’ ouster from the Company. *See id.* at 10 (“the broader fraud and breach of fiduciary duty claims concerning the overall conspiracy remain intact, including as asserted directly against Levine, and for his aiding and abetting Zimmermann

... [and also] the aiding and abetting claims against Levine also remain to the extent of [the Patrizzi Defendants’] underlying claims against Zimmermann.”).

Plaintiffs note that the parties’ disagreements “are quite narrow.” See Dkt. 2714 at 4. But, as discussed earlier, they continue to dispute the proper status of the accounting claim. “[T]he only apparent disputes between the parties relate to the survival or scope of Defendants’ First, Second, Third, Twelfth and Fifteenth Counterclaims.” See *id.* at 6. They argue that: (1) the fraudulent concealment claim remains dismissed, as it was dismissed by this court and not addressed by the Appellate Division [see *id.* at 6-7]; (2) the claim for dilution was dismissed by this court and not disturbed by the Appellate Division; (3) the Patrizzi Defendants can no longer challenge the enforceability of the SPDA because the claim for rescission of the SPDA has been dismissed; and (4) “the only fraud or breach of fiduciary duty claims remaining against Zimmermann relate to Defendants’ claim that Zimmermann failed to disclose his purported intent to vote a majority of the shares in [the Company] to remove Patrizzi and Verhoeven” [see *id.* at 11].

IV. Discussion

A straightforward reading of *AQAM V* is that the Patrizzi Defendants’ counterclaim for an accounting from the Company and related fraud and fiduciary duty claims were reinstated,¹³

¹³ Regarding the accounting from the Company, the Appellate Division held that:

Issues of fact as to the handling of the [Company’s] inventory by Patrizzi or others after his departure and whether plaintiffs engaged in a scheme to oust Patrizzi from the company preclude summary dismissal of the inventory sale proceeds claims based on fraud and breach of fiduciary duty. However, we affirm the dismissal of the counterclaim for the equitable remedy of a constructive trust, because there is no evidence of unjust enrichment, and Habsburg and Patrizzi have an adequate remedy at law, as shown by the relief they seek, i.e., damages resulting from the deprivation of inventory sale proceeds. We affirm the dismissal of the constructive fraud claim, because Habsburg and Patrizzi cannot show the

as were all claims within the scope of the defendants' claim for breach of the Consulting Agreement.¹⁴ Additionally, all claims asserted against Levine based on his drafting of the SPDA were dismissed,¹⁵ and, as a result, all claims predicated on such wrongdoing (i.e., challenging the SPDA's enforceability) necessarily must fail.

The parties' disputes are resolved as follows.

The Company must provide an accounting. The accounting is critical because it affects the viability of the Patrizzi Defendants' fraud and breach of fiduciary duty counterclaims. *See AQAM V*, 154 AD3d at 431 ("Issues of fact as to the handling of the [Inventory] by Patrizzi or

existence of a fiduciary or confidential relationship that would warrant their reposing confidence in Levine at the time of the return of the \$2 Million Transfer in 2010 to [the Company].

AQAM V, 154 AD3d at 431 (internal citation omitted). By contrast, the Appellate Division explained why it did not revive the balance of the accounting claims:

The accounting counterclaim against Zimmermann as transfer escrow agent was correctly dismissed based on the motion court's prior finding that Zimmermann had already fully documented his activities in that capacity. The accounting counterclaim against Zimmermann as to sums in the escrow account related to the [SPA] and [the Company] was correctly dismissed based on the court's finding that the claim related to Zimmermann's fee from [AH] had previously been dismissed as speculative. The accounting counterclaim against [Antiquorum USA] was correctly dismissed, because that entity owns no inventory. However, **we reinstate the accounting counterclaim against [the Company], because it has been narrowed to address [the Company's] inventory sale proceeds only.**

Id. (emphasis added).

¹⁴ "Dismissal of the counterclaim for breach of Patrizzi's consulting agreement is precluded by issues of fact as to Patrizzi's departure from the company that leave unresolved whether Zimmermann's alleged actions constituted a repudiation or an anticipatory breach of the agreement." *AQAM V*, 154 AD3d at 432.

¹⁵ "The cross claims alleging fraud and breach of fiduciary duty based on Levine's drafting of the [SPDA] should have been dismissed based on the evidence in the record establishing that Patrizzi voluntarily signed the agreement after being given an opportunity to review its terms." *AQAM V*, 154 AD3d at 432.

others after his departure and whether plaintiffs engaged in a scheme to oust Patrizzi from the company preclude summary dismissal of the inventory sale proceeds claims based on fraud and breach of duty fiduciary.”). The accounting will show whether the Patrizzi Defendants are owed money from the sale of the Inventory. At trial, it will be determined if there were items in the Inventory that were sold and, if so, for how much. The court also rejects the parties’ myriad characterizations of the proper scope of the accounting, as the Appellate Division set forth its scope. *See id.* (only “reinstat[ing] the accounting counterclaim against [the Company], because **it has been narrowed to address [the Company’s] inventory sale proceeds only.**”) (emphasis added).

Similarly, the court rejects plaintiffs’ contention that the fraudulent concealment claim, which had been dismissed by this court in the July 2016 Decision, was not revived by the Appellate Division. This court reads *AQAM V* as having revived all fraud and fiduciary claims asserted against plaintiffs concerning the Inventory. Nothing in *AQAM V* suggests that the Appellate Division agreed with plaintiffs that the concealment portion of the claim is infirm, for instance, because it concerns Zimmerman’s actions from 2007 onward. Where the Appellate Division saw fit to reject certain subsets of the claims relating to the Inventory for lack of a fiduciary relationship, it did so expressly. *See id.* (e.g., rejecting claim for constructive fraud because the Patrizzi Defendants cannot show fiduciary relationship with Levine). The court interprets the Appellate Division’s revival of “the inventory sale proceeds claims **based on fraud**” to include claims based on fraudulent concealment. *See id.* (emphasis added). After all, if there are grounds to compel an accounting (which there are for reasons explained above), surely there exists a special enough relationship (or at least facts warranting invocation of the

“special facts doctrine”), to justify the maintenance of a claim for fraudulent concealment. *See Greenman-Pedersen, Inc. v Berryman & Henigar, Inc.*, 130 AD3d 514, 516 (1st Dept 2015); *TIAA Glob. Investments, LLC v One Astoria Square LLC*, 127 AD3d 75, 87 (1st Dept 2015); *P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 (1st Dept 2003).

Next, all claims subsumed under the cause of action for breach of the Consulting Agreement remain. *See id.* at 432 (“Dismissal of the counterclaim for breach of [the Consulting Agreement] is precluded by issues of fact as to Patrizzi’s departure from the company that leave unresolved whether Zimmermann’s alleged actions constituted a repudiation or an anticipatory breach of the agreement.”). While this court had dismissed the dilution claim, since such claim was part of the claim for breach of the Consulting Agreement [*see* June 2016 Decision at 55-56], it has been revived. The Appellate Division reinstated that cause of action, not merely a portion of it.

Further, all claims concerning Levine’s drafting of the SPDA have been dismissed. The SPDA’s enforceability cannot be challenged because “Patrizzi voluntarily signed the agreement after being given an opportunity to review its terms.” *AQAM V*, 154 AD3d at 432. Thus, Patrizzi’s illegality argument based on Levine’s conduct is precluded. Also dismissed is the constructive fraud claim asserted against Levine. *See id.* at 431. However, all other claims against Levine survive and will be tried.¹⁶

Finally, while the court expressed skepticism regarding the viability of Levine’s cross-claim for attorneys’ fees and costs, the court simply denied him summary judgment and did not dismiss the claim. *See* June 2016 Decision at 60-61. The merits of the claim are for the finder of fact. Accordingly, it is

¹⁶ As discussed earlier, it is too late for Levine to file another summary judgment motion.

ORDERED that the following claims will be tried: (1) plaintiffs' second cause of action against Levine for a declaration that he must release certain stock shares from escrow to AQAM; (2) plaintiffs' fifth cause of action against Habsburg for allegedly failing to deliver certain shares into escrow with Levine; (3) the Patrizzi Defendants' counterclaim for an accounting from the Company concerning the Inventory and its sale proceeds, as well as all related fraud (including concealment) and breach of fiduciary duty claims asserted against plaintiffs; (4) the entirety of the first (ouster claim), second (Karastir Payment claims), and fourth (Levine's cross-claim for fees) itemized claims set forth on pages 61-62 of the July 2016 Decision; (5) the entirety of the Patrizzi Defendants' counterclaim for breach of the Consulting Agreement; and (6) all of the Patrizzi Defendants' claims against Levine except (a) those related to the SDPA and (b) the constructive fraud cause of action; and it is further

ORDERED that the SPDA must be treated as effective and enforceable, all arguments to the contrary are precluded, as are all claims based on Levine's drafting of it; and it is further

ORDERED that all of the parties' other proposed limitations on the surviving claims, whether styled as requests for clarification, summary judgment, or an *in limine* order, are denied; and it is further

ORDERED that no party may file any further summary judgment motion; and it is further

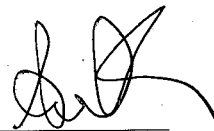
ORDERED that (1) affirmative expert reports must be served by June 28, 2018;¹⁷ (2) rebuttal reports must be served by July 31, 2018; (3) expert depositions must be completed by August 28, 2018; and (4) the deadline to file a Note of Issue is August 30, 2018; and it is further

¹⁷ If no party serves an expert report by June 28, a Note of Issue shall be promptly filed and the parties shall immediately contact the court to schedule a pre-trial conference.

ORDERED that a telephone conference will be held on September 6, 2018 at 3:30 pm, to discuss the scheduling of a pre-trial conference.

Dated: May 30, 2018

ENTER:



J.S.C.
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