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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

D.D. MANUFACTURING N.V.,

Plaintiff,

- v -

DANIEL K INC.,

Defendant.

Index No.: 102439/09

Motion Date: 04/13/12

Motion Seq. No.: 05

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1
Answering Affidavits - Exhibits	No(s).	2
Replying Affidavits - Exhibits	No(s).	3

Cross-Motion: ☐ Yes ☐ No

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

In this action for breach of contract, plaintiff D.D. Manufacturing ("DDM") moves for partial summary judgment in its favor, pursuant to CPLR 3212 (e), 7108 (a) and 7109 (b), on the third cause of action in the complaint. Defendant Daniel K. Inc. opposes and cross-moves for leave to amend its answer, pursuant to CPLR 3025, and to compel plaintiff to post security for costs pursuant to CPLR 8501.

Plaintiff is a diamond wholesaler and manufacturer, located in Antwerp, Belgium. Defendant is a jewelry manufacturer, wholesaler and retailer, headquartered in New York City. The

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

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

parties executed a consignment agreement, dated October 11, 2002 (the Agreement). Under the Agreement, plaintiff would consign diamonds, other gems and precious metals to defendant "for individual sale or mounted into settings of jewelry and merchandise belonging to DANIEL K." Plaintiff filed a UCC-1 financing statement in New York State for the consigned merchandise in 2002, and a continuation statement in 2007.

On December 1, 2008, plaintiff sent defendant a letter asking for return of all unsold consigned merchandise that originated with plaintiff. A summary inventory report, signed by Daniel Koren, defendant's president, was attached to the letter. The report gave $9,407,088.91 as the total value of plaintiff's consigned merchandise, as of October 29, 2008. On December 5, 2008, plaintiff sent defendant a letter announcing an inspection of the consigned merchandise and all related books and records. Defendant responded, on December 10, 2008, denying plaintiff access to its premises and the right to inspection of its merchandise and records. In another letter, also dated December 10, 2008, defendant stated that plaintiff had not issued credit for recently returned merchandise and had sent it merchandise not subject to terms of the Agreement. While not admitting it as fact, the second letter allows plaintiff to "assume that you sent us Consigned Merchandise which was not returned . . . [pursuant

to the Agreement, § 12 (A), because it has] been processed, mounted, utilized or set into jewelry or other merchandise."

On December 15, 2008, plaintiff sent defendant a notice of default, pursuant to the Agreement, because of defendant's refusal to allow an inspection of its books and records pertaining to plaintiff's merchandise. The Agreement allows defendant 10 days to cure a default. If defendant did not cure the default, it must immediately cease selling all of plaintiff's consigned merchandise and return it to plaintiff within 10 days, or pay for it.

Plaintiff commenced this action on February 20, 2009, claiming that defendant retained consigned merchandise worth $7,447,819 and owed $4.4 million for sold merchandise. The complaint asserts causes of action for breach of contract (first), conversion (second), and seizure of chattel (third).

On July 17, 2009, the court denied plaintiff's motion for a preliminary injunction for an order of seizure of chattel, because plaintiff failed to tender an undertaking in any amount, to demonstrate a probability of success on the merits, and to establish the uniqueness of the chattel.

CPLR 7108 (a) provides that "[d]amages for wrongful taking or detention . . . of a chattel may be awarded to a party." If the prevailing party cannot be awarded possession of the chattel, the court shall award its value instead.

CPLR 7109 (b) permits the court to "direct that a party in possession deliver the chattel to the party entitled to possession," where the chattel is unique. "[T]he uniqueness requirement [of CPLR 7109 (b)] does not force plaintiffs to prove that each chattel is rare or irreplaceable, but simply that it is not a mass-produced item readily available on the market, such that a money judgment enabling purchase of a replacement would be an adequate remedy." Christie's Inc. v Davis, 247 F Supp 2d 414, 424 (SD NY 2002). "While a 'Ford truck' is not unique, a 1967 Ferrari automobile valued, without dispute, at $50,000, is sufficiently unique to come within the ambit of this statute [CPLR 7109]." Giordano v Grand Prix Sales, Serv. Restoration Co., 113 Misc 2d 395, 400 (Sup Ct, Nassau County 1982) (citation omitted).

The Agreement, in section 1, states that plaintiff, "may from time to time, at its sole option, upon receipt of a written order from DANIEL K," deliver "such Consigned Merchandise as may be mutually agreed to and set out in DANIEL K's written order." The "Consigned Merchandise delivered to DANIEL K shall at all times remain the property of DD until sold to customers of DANIEL K." Defendant shall permit plaintiff, "upon reasonable notice," to inspect the Consigned Merchandise and "DANIEL K's books and records relating to the Consigned Merchandise." "The parties hereto agree that this Agreement creates a true consignment, and

that all transactions hereunder shall constitute a true consignment of the Consigned Merchandise and not the purchase and sale of merchandise by DANIEL K." At any time, "for any reason whatsoever," plaintiff may demand return of any or all of the unsold consigned merchandise. Defendant is obliged to return, within 10 days, "all Consigned Merchandise which has not been processed, mounted, utilized or set into jewelry and other merchandise in its custody." Consigned merchandise which is in some stage of fabrication must be returned within 90 days.

Defendant also had the right, "at its sole option and at anytime," to return some or all consigned merchandise to plaintiff. Either party had the right to terminate the Agreement "for any reason whatsoever by written notice." In case of termination, consigned merchandise would be handled as if a notice of return had been served, except that the 90-day period to return the merchandise in some stage of fabrication is reduced to 30 days.

Section 15 defines various "Events of Default." In case of default, defendant must stop selling all consigned merchandise immediately and return it within 10 days, regardless of its condition. Unreturned merchandise must be paid for.

Section 24 extends the Agreement

> "to all such loose, polished, and graded diamonds, gems, precious and semi-precious stones, gold, silver, and precious metals delivered by DD to DANIEL K as well as any accessions thereto as such term is defined in

> the Uniform Commercial Code, and to those that have been mounted into jewelry and merchandise, including, without limitation, rings, necklaces, chains, bracelets, watches, pendants, bands, earrings, pins, and other jewelry and jewelry-related items."

Daniel Koren, defendant's principal (Koren), was deposed on September 26, 2011. He said that plaintiff was the major supplier for his company, and he had some indeterminate number of its diamonds in his possession. He assumed that the number exceeded 100. He has a computer system that keeps track of such information.

Koren described the parties as "partnered" and in a "joint venture." He said that "in the beginning he [plaintiff's owner,] was supplying me diamonds under a consignment agreement. And then once we've continued into - again into more business together, he started - we talked about doing a joint venture." Koren described the terms of the purported joint venture agreement to create Daniel K Jewelry LLC (DKJ), which he claimed "existed as a company, as an LLC. But it never ran a business under joint venture." While apparently no joint venture agreement was ever executed, "a supply agreement" was, which Koren claimed that he signed. In its answer to the complaint, defendant stated that "[o]n July 1st, 2004 the parties executed a 'Supply Agreement' pursuant to which Plaintiff agreed to supply Defendant with all of its diamonds at a preferred price . . . and Plaintiff further agreed not to establish a business in the

United States that would compete with Defendant's business." However, a copy of the supply agreement that was introduced at the deposition was unsigned. The copy attached as Exhibit T to the Cross Motion is signed by defendant only.

Koren offered some additional testimony about a writing:

> "Q. Do you have anything in writing?
> A. A consignment agreement. And then we have our partnership agreement, Joint Venture Agreement, that's all.
> Q. Did you ever sign the partnership agreement?
> A. I know I signed it. I signed the agreement that Mr. deBlock[, an attorney for plaintiff,] took to Belgium with him. I never received a signed copy back.
> Q. That was a partnership agreement?
> A. Joint Venture Agreement.
> . . .
> Q. Where is the signed agreement that says DDM agreed to the joint venture?
> A. I don't know. Ask Mr. deBlock."

Later in his testimony, Koren gave an alternate description of the Joint Venture Agreement:

> "Q. Is Daniel K's position that the terms of the Joint Venture Agreement are oral?
> A. No.
> Q. What are the terms then? Where are they written?
> A. We had also - most of the terms were concisely written down when we sat down with Arosdol [Erez Daleyot, plaintiff's principal], to write down the points of what we need - what was required from us from the joint venture, and it was written down in a document.
> Q. Where is that?
> A. That was actually e-mailed to us from - or sent to us from Goodwin Proctor[, a law firm engaged by plaintiff,] with all the points of what would both companies be bringing into the - the requirements and the job descriptions of whatever of - both parties, DD Manufacturing and Daniel K.
> Q. And your position is that governs the relationship?

A. Yes."

One document produced by defendant approximates this description, the "Areas of Business Agreement for Partnership: DDM/Daniel K," dated June 16, 2004, which is unsigned and reads like a plan not a contract. "A joint venture form is desired by Daniel K, rather than a simple buyer-supplier relationship. Exit strategies should be built into the business." A critical statement is found under the heading "Corporate structuring": "The end result should be a 50:50 interest in Daniel K by a 'DDM entity' (DDM) and a 'Daniel Koren' entity (DK). The mechanism for this is still to be determined."

Koren also spoke about a share agreement which would entitle plaintiff to own 10% of his business. However, "I never signed it." Contrary to this assertion, a copy of "Share Purchase Agreement Daniel K/D.D. Manufacturing" signed by defendant only is attached to the papers that defendant submitted in its cross motion. Although Koren testified that a joint venture existed between the parties based on plaintiff's conduct, to wit: "In many ways that they've honored 60 to 70 percent of that agreement by going and showing faith into the business, they did honor that agreement," but in response to the unsigned Joint Venture Agreement to form DKJ produced at the deposition, he commented that "[t]hey never put - we never put it into place in this particular case."

Koren admitted that there was only one explicit relationship between the parties: "Q. Isn't it a fact the only signed agreement that exists between DDM and Daniel K is this consignment agreement? A. It's a fact." The Agreement was modified once, by a letter, dated June 11, 2008, countersigned by Koren and Daleyot. It allowed defendant to "be able to deliver consigned goods to existing customers in a more timely manner" by modifying UCC procedures. Until this dispute, Koren stated that plaintiff was his "sole supplier [of diamonds]." He said that he became dissatisfied with plaintiff because of the high prices charged for merchandise and the restrictions imposed on him. When he outlined three options to improve or alter the relationship between the parties, plaintiff preemptively asked for return of all of its merchandise. He admitted that somewhere between 20% to 40% of his current inventory contained plaintiff's diamonds, although the deposition was being held 19 months after the action commenced. He testified that he never returned plaintiff's merchandise because it acted "without even negotiating or talking." Additionally, he said that some of the requested merchandise is not plaintiff's.

Koren stated that he signed the Agreement in 2002, and even now "didn't know that it was necessarily terminated." He thought that "I don't have the authority to terminate something like this." Koren testified that "in the beginning he [plaintiff] was

supplying me diamonds under a consignment agreement, and the Agreement corroborates such testimony. However, Koren also claimed alternate business arrangements. "And then once we've continued into - again into more into business together, he started - we talked about a joint venture. In his opposing affidavit, eh states "[A]lthough a Consignment Agreement was executed in 2002, the parties subsequently changed their business relationship and elected not to conduct business in accordance with the 2002 Consignment Agreement."

Koren testified that, "[o]n very rare occasions," he would send plaintiff an e-mail request if he had a very specific need by size or color for a diamond. "But other than that they would just ship diamonds on a regular basis without any requests." His position is that Section 1 governs over Section 24. Only merchandise shipped in response to his written order was consigned merchandise under the Agreement. Otherwise it "was sent under the Joint Venture Agreement." "In hundred million dollars of merchandise that came to me [from plaintiff], I didn't order one diamond, it was all shipped. So I don't know what that means or what it doesn't mean, but it - that's not what the Consignment Agreement was - how we understood it."

Plaintiff argues that the absence of a written order by defendant prior to shipment of diamonds, as prescribed by section 1 of the Agreement, "does not alter the fact that each shipment

of diamonds by DDM to Daniel K after execution of the Consignment Agreement constituted a shipment of Consigned Merchandise." It cites Section 27 of the Agreement in support of this position: "No failure by DD at any time to insist upon strict compliance under this agreement shall constitute a waiver or preclude DD from asserting or exercising its rights to demand strict compliance under this Agreement at a later date."

During his deposition, Koren was presented with memoranda (memo) allegedly sent with diamonds shipped by plaintiff to defendant from sometime in 2004 through April 2008. Each one contained the following language: "The goods delivered under this memorandum are Consigned Merchandise pursuant to the Consignment Agreement dated October 11, 2002, by and between D.D. Manufacturing, N.V. and Daniel K, Inc. and the UCC-1 financing statement filed and recorded on October 15, 2002, with the Department of State of the State of New York." Koren never denied receipt or acceptance of the merchandise shipped under these memos, although there is no evidence that he ever placed a written order for the merchandise. Such memos are consistent with section 11 (a) of the Agreement, which provides that,

> "[u]pon acceptance by DD of a written order from DANIEL K for the delivery of the Consigned Merchandise, DD shall prepare the Memo, which will accompany each shipment of Consigned Merchandise to DANIEL K. The Memo shall generally describe and identify the items of Consigned Merchandise contained in that shipment and shall contain the price to be charged by DD and to be paid by DANIEL K for the Consigned Merchandise."

In summary, the only fully executed agreement that exists between the parties is the Agreement. The joint venture or reciprocal ownership interest in the other's business never materialized. Not only were documents unsigned, the parties followed operations and practices that had prevailed since October 2002 (with the exception of the change in UCC processing agreed to in June 2008).

Defendant argues that, since it almost never placed a written order with plaintiff, merchandise delivered by plaintiff was not consigned merchandise. Plaintiff contends that all merchandise it delivered to defendant was consigned merchandise by the terms of the Agreement, particularly according to section 10 ("parties hereto agree that this Agreement creates a true consignment, and that all transactions hereunder shall constitute a true consignment of the Consigned Merchandise and not the purchase and sale of merchandise by DANIEL K"), section 24 ("[t]his Agreement shall apply to all such loose, polished, and graded diamonds, . . . [other precious stones and metals] delivered by DD to DANIEL K"), and the memos, which defined the merchandise in the shipments as consigned merchandise. The absence of written orders by defendant, plaintiff maintains, does not preclude strict compliance with the Agreement subsequently, pursuant to section 27.

Plaintiff unpersuasively argues that the phrase "at its sole option," found in Section 1, places defendant's ability to create a written order at the discretion of plaintiff. Rather, the language simply allows plaintiff to choose whether to deliver merchandise as ordered. It is undisputed that plaintiff delivered millions of dollars of diamonds and other jewelry to defendant without written orders.[1] Additionally, plaintiff acknowledged contributing to defendant's advertising, having access to defendant's financial records and computer system, contributing to the renovation and construction of defendant's offices, and guaranteeing its lease.

Defendant argues that

> "the relationship between the parties is not, in fact or in practice, one of consignor-consignee, but rather a joint venture in which Plaintiff has promised to support and build Defendant's business, directed Defendant to incur significant financial obligations for Plaintiff's benefit; agreed to share in profits and losses with Defendant; and controlled the day to day operations of Defendant's business for years."

While there is no dispute that the relationship between the parties went far beyond arm's-length buying and selling, defendant provides no more than conclusory allegations to support its allegation that the Agreement was replaced by any other organized or systematic arrangement. Additionally, there is no evidence that activities conducted by the parties outside the

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[1]Daleyot testified that "[s]ometime he [Koren] deliver [an order] on paper, many times he ask it through the phone."

scope of the Agreement, such as joint advertising or construction financing, had any effect on the flow, character or definition of the merchandise that passed between them. Only the Agreement provides a formal, mutually-agreed-to framework for the parties' business transactions. There is no factual support for any alternate business relationship. Koren's attempts to posit other working arrangements with plaintiff inevitably lead to unexecuted documents, unrecorded promises, or self-serving recollections. See Titan Communications, Inc. v Diamond Phone Card, Inc., 94 AD3d 740, 741 (2d Dept 2012) ("The defendant provided no evidence to support its claims, and its principal acknowledged, at his deposition, that it had no documents to substantiate its claims. Such conclusory assertions are insufficient to defeat a motion for summary judgment").

While the parties continued to do business for at least six years, the Agreement permitted defendant, "at its sole option and at anytime," to return the consigned merchandise, presumably an option available to him without a binding agreement. It is unreasonable to expect that a businessperson at either end of this business arrangement would allow the uninterrupted flow of millions of dollars of diamonds in the absence of an enforceable agreement. Defendant never claims to have been compelled to take or keep plaintiff's merchandise, except that plaintiff was his sole supplier and he needed merchandise to sell. At one point,

Koren testified that "I wasn't technically allowed to buy the majority of my diamonds from anybody else," but did not explain the basis for this technical limitation. By whatever authority, defendant handled millions of dollars of plaintiff's diamonds over the years, and admittedly still possessed some after the instant action commenced.

"[C]larity and predictability are important considerations in contract interpretation." Federated Retail Holdings, Inc. v Weatherly 39th St., LLC, 77 AD3d 573, 574 (1st Dept 2010). The Court of Appeals has held that "the reasonable expectation and purpose of the ordinary business [person] when making an ordinary business contract will be considered in construing a contract." BP A.C. Corp. v One Beacon Ins. Group, 8 NY3d 708, 716 (2007) (internal quotation marks and citation omitted). The parties who crafted the Agreement made no provision for any merchandise but consigned merchandise, or any type of merchandise transaction that does not involve consigned merchandise. As section 10 states: "The parties hereto agree that this Agreement creates a true consignment, and that all transactions hereunder shall constitute a true consignment of the Consigned Merchandise and not the purchase and sale of merchandise by DANIEL K." Further, while defendant maintains that the merchandise plaintiff seeks to recover "were contributed to the joint venture pursuant to Plaintiff's obligations under the 2004 Joint Venture agreement,"

defendant ignores shipping memos, dated January 12, 2005 through April 21, 2005, attached to his own reply affidavit, which all state: "The goods delivered under this memorandum are Consigned Merchandise pursuant to the Consignment Agreement dated October 11, 2002, by and between D.D. Manufacturing, N.V. and Daniel K, Inc. and the UCC-1 financing statement filed and recorded on October 15, 2002, with the Department of State of the State of New York." It is not credible to hold that an unsigned 2004 document overrides these later shipping memos supplied by defendant.

Defendant offers no factual evidence of an on-going business arrangement between the parties outside the scope of the Agreement. Koren testified that "in the beginning he [plaintiff] was supplying me diamonds under a consignment agreement." His urging that a significant change to their dealings is without foundation, begin based on unsigned or missing documents and his anecdotal recollections of agreements accepted or rejected by one party or the other. It also overlooks his assertion that he "didn't know that [the Agreement] was necessarily terminated."

Koren's affidavit in support of the cross motion offers an argument that suggests that the Agreement and the joint venture may have been in effect simultaneously: "On December 10th, 2008, I notified Plaintiff that the 2002 Consignment Agreement was not applicable because no goods delivered to the joint venture had

been delivered pursuant to a written order from Defendant, a pre-condition to their classification as 'consigned goods.'" such argument flies in the face of the fact that written orders were almost never used from the beginning of their relationship in 2002. Nor does defendant refute the documentary evidence of the memos stating "goods delivered under this memorandum are Consigned Merchandise pursuant to the Consignment Agreement dated October 11, 2002," accompanying several shipments during the period of the purported joint venture, 2004 to 2008.

Defendant's argument that plaintiff characterized some of their transactions as sales, not consignments, in plaintiff's dealings with banks, is of no moment, since such representations do not excuse defendant from fulfilling its contractual obligations under the Agreement, and leaving plaintiff to sort out its financial arrangements with its lenders. Moreover, defendant's acceptance of the merchandise during the duration of the Agreement extinguished any objections it may have had to the nefarious financial dealings concerning the diamonds in which defendant now alleges that plaintiff was engaged. Gem Source Intl v Gem-Works NS, LLC, 258 AD2d 373 (1st Dept 1999). In sum, defendant fails to offer any material issues of fact sufficient to defeat plaintiff's motion for partial summary judgment.

Plaintiff provides a list of diamonds that it claimed, as of December 1, 2008, were held by defendant as consigned

merchandise, pursuant to the Agreement. The list is more than forty three pages long; each page containing thirty or so items. The alleged total sales value of this merchandise is $5,687,343.73. Additionally, it submits a jewelry inventory report, as of September 18, 2008, attributed to defendant, that is one hundred and thirty-two pages long. This report gives the total cost of the diamond contents of the jewelry at $9,411,673.49, distributed as "DD $4,017,804.22" and "Other $5,393,869.27." There is no cross-references provided for the two lists.

According to Koren's testimony, his relationship with defendant began in 2002, at an international jewelry show, when Daleyot approached him and derided the "salt" (small diamonds) that Koren was selling. Daleyot allegedly said that "I am going to show you big diamonds." Koren then ended a supply relationship that he had with another diamond merchant, and, in answer to a question, agreed that plaintiff's diamonds were "in fact larger and higher quality than the diamonds you were receiving from" the other source. He said that "it was a perfect match for me to work with DD Manufacturing because their diamonds were finely cut; my craftsmanship and my quality of manufacturing was fine, very fine, so it would make a beautiful product."

The number or value of the disputed merchandise is still to be determined. However, Koren's testimony indicates that much of

the merchandise may evoke the uniqueness that warrants recovery rather than financial compensation where possible. Therefore, defendant shall deliver all the diamonds identified on plaintiff's list of consigned merchandise, Exhibit A attached to Berenblit Affidavit. If defendant is unable to return all such merchandise, plaintiff may apply to the court for monetary damages.

Defendant seeks leave to amend its answer to the complaint, pursuant to CPLR 3025 (b), which provides that "[l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." Such application shall be granted "absent prejudice or surprise resulting directly from the delay." Fahey v County of Ontario, 44 NY2d 934, 935 (1978). "On a motion to amend pleadings (CPLR 3025 [b]), the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face." Hospital for Joint Diseases Orthopaedic Inst. v Katsikis Envitl. Contrs., 173 AD2d 210 (1st Dept 1991).

The proposed amended answer is attached to defendant's cross motion. Defendant proposes to delete the first affirmative defense in its original answer which sought to dismiss the complaint on the ground that plaintiff failed to register as a foreign corporation authorized to do business in New York. The court denied this request in its July 22, 2009 decision. As the

issue is moot, the leave to amend by deletion of the first affirmative defense shall be granted.

Defendant proposes a new first affirmative defense "that the status quo ante be maintained until such time as this Court shall render full and final judgment upon Defendant's counterclaims." As a request for injunctive relief, such is not an appropriate defense to the complaint, and its inclusion in the proposed answer shall be denied.

Defendant proposes identifying the sixth, eighth, ninth and tenth affirmative defenses as counterclaims as well. In its original answer, defendant reserved the right to convert these affirmative defenses into counterclaims for monetary relief by its twelfth affirmative defense, if plaintiff was held to be authorized to do business within New York. The sixth affirmative defense asserted a current "credit note" against plaintiff of no less than $2,613,284.85; the eighth asserted a set-off of at least $12 million for overvalued merchandise; the ninth asserted commissions of at least $2.52 million; and the tenth asserted lost commissions of at least $750,000.

Plaintiff opposes the cross motion for leave to amend as untimely, prejudicial and constituting an unfair surprise. However, aside from the discarded proposed substitute first affirmative defense, the other proposed amendments were foretold by defendant's answer, dated March 27, 2009. There should no

surprise or prejudice to plaintiff by effecting this change at this date. Defendant is granted leave to amend its answer by asserting the sixth, eighth, ninth and tenth affirmative defenses as counterclaims.

The posting of security for costs is unnecessary in this action. With millions of dollars of merchandise at stake, the minimal posting is superfluous. Therefore, defendant's request to compel plaintiff to post security for costs, pursuant to CPLR 8501, shall be denied.

Accordingly, it is

ORDERED that plaintiff D.D. Manufacturing N.V.'s motion for partial summary judgment in its favor, pursuant to CPLR 3212 (e) and 7109 (b), on the third cause of action in the complaint is granted, and defendant Daniel K Inc. is directed to deliver the diamonds identified on plaintiff's list of consigned merchandise, dated December 1, 2008 (Berenblit Aff., Ex. A), within fourteen days of service of this order with notice of entry, to plaintiff at a New York City location to be named by plaintiff; and it is further

ORDERED that plaintiff's motion for partial summary judgment in its favor, pursuant to CPLR 7108 (a) is denied; and it is further

ORDERED that defendant's cross motion for leave to amend its answer, pursuant to CPLR 3025, is granted in part, and the first

affirmative defense is withdrawn, and the sixth, eighth, ninth and tenth affirmative defenses in the original answer shall be asserted as counterclaims; and it is further

ORDERED that defendant's cross motion for leave to amend its answer by asserting the proposed first affirmative defense is denied; and it is further

ORDERED that the amended answer as aforesaid shall be deemed served upon plaintiff within twenty days of entry of this order; and it is further

ORDERED that defendant's cross motion to compel plaintiff to post security for costs, pursuant to CPLR 8501, is denied.

This is the decision and order of the court.

Dated: October 11, 2012

ENTER:

DEBRA A. JAMES J.S.C.