SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 652367/2010
AQ ASSET MANAGEMENT LLC (AS
vs.
LEVINE, (IN HIS CAPACITY AS
SEQUENCE NUMBER : 007
DISMISS ACTION

INDEX NO. _____
MOTION DATE 8/9/12
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 _____ | No(s). 79—116
Answering Affidavits — Exhibits _____ | No(s). 120, 50-59, 174-209
Replying Affidavits _____ | No(s). 231—235

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: 3/28/13

SHIRLEY WERNER KORNREICH J.S.C.
_____, J.S.C.

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,

-against-

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

Defendants.

Index No. 652367/2010
DECISION & ORDER

----------X

MICHAEL LEVINE, as Escrow Agent,

Interpleader Counterclaimant,

-against-

AQ ASSET MANAGEMENT LLC (as Successor to Artist House Holdings Inc.), ANTIQUORUM, S.A., ANTIQUORUM USA, INC., EVAN ZIMMERMANN, HABSBURG HOLDINGS LTD. and OSVALDO PATRIZZI ,

Interpleader Claimants

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HABSBURG HOLDINGS LTD. and OSVALDO PATRIZZI,

Fourth-Party Plaintiffs,

-against-

MICHAEL LEVINE, individually

----------X

MICHAEL LEVINE,

Fifth-Party Plaintiff,

-against-

KERRY GOTLIB, MICHAEL HASKEL, LEO VERHOEVEN and OSVALDO PATRIZZI,

Fifth-Party Defendants

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KORNREICH, SHIRLEY WERNER, J.:

Motion sequence numbers 7 and 9 are consolidated for disposition. This action arises out of the January 2006 corporate restructuring of an auction house. At closing, the shares and the purchase money were to be placed in escrow and then disbursed to various parties. Certain shares and funds currently remain in escrow. A dispute has arisen as to the ownership of this property, and an interpleader action was instituted. In motion sequence 7, Michael Levine, the escrow agent, moves to partially dismiss the claims and counterclaims that the sellers in the stock sale, Habsburg Holdings Ltd. (Habsburg) and Osvaldo Patrizzi (together with Habsburg, Sellers) assert against him in their answer to his interpleader complaint and their fourth-party complaint. In motion sequence 9, plaintiffs AQ Asset Management LLC (AQ Asset), Antiquorum S.A., Antiquorum USA, Inc. (Antiquorum USA) and Evan Zimmermann move to partially dismiss the counterclaims that the Sellers assert against them in their answer to the complaint. The court grants each motion in part.

I. Background

A. The Transaction

Since this is a motion to dismiss Sellers' claims and counterclaims, the following account is based on the Sellers' pleadings and affidavits, which are vigorously disputed by plaintiffs and Levine.

Habsburg Holdings Ltd. (Habsburg) is a British Virgin Islands corporation (fourth-party complaint ¶ 1). Osvaldo Patrizzi is a native of Italy and a citizen of Monaco (*id.* at ¶¶ 2, 19).

Habsburg and Patrizzi were the owners, directly or indirectly, of all the outstanding capital stock of the following four entities: (i) Antiquorum S.A., a Swiss corporation; (ii) Antiquorum USA, a New York corporation; (iii) C2C Time, Inc.; and (iv) Antiquorum Auctioneers (Hong Kong) Ltd. (affirmation of Michael Haskel, March 28, 2012 [first Haskel affirmation], exhibit 11 [Artist House Agreement] §§ 3.3–3.4). Together these entities comprise a business known as Antiquorum, an auction house for valuable watches (the Company). Prior to the transaction at issue, the Company was led by Patrizzi as chief executive officer and chairman of the board of directors (affidavit of Osvaldo Patrizzi, sworn to March 28, 2012 [first Patrizzi affidavit], ¶ 7).

At some point in the 1990's, Patrizzi became friendly with Zimmermann and hired him as counsel to Antiquorum USA (*id.* at ¶ 6). In 2004, seeking to reduce his role in the Company, Patrizzi discussed with Zimmermann the idea of selling some or all of his and Habsburg's interest in the Company (*id.* at ¶ 7). At Zimmermann's suggestion, the Sellers retained Zimmermann as their attorney to pursue the contemplated sale, and at Zimmermann's recommendation, retained Levine to assist Zimmermann to negotiate and draft the agreements and necessary documents (*id.* at ¶¶ 7 & 9).

Zimmermann ultimately located a potential Japanese investor named Artist House Holdings, Inc. (Artist House) (*id.* at ¶ 10). Zimmermann and Levine proceeded to negotiate a stock purchase agreement between Artist House, as buyer, and Habsburg and Patrizzi, as sellers, and drafted the various iterations of the contracts documenting the deal (*id.* at ¶ 12). Under the final version (referred to as the Artist House Agreement), effective as of December 9, 2005, Artist House agreed to purchase 50% of the Company's stock for $30 million cash, paid in installments, and the provision of a $10 million line of credit for the Company's use (Artist House Agreement § 2.2). The cash was to be wired to Zimmermann, as transfer escrow agent,

who was to immediately wire the funds to Levine, who was to serve as the main escrow agent (*id.* at § 13.2). The Sellers were to deliver their stock certificates to Levine (*id.* at § 13.3).

The question of how many shares the Sellers were required to deliver, or when and to whom Levine was to disburse the escrowed shares and funds, is at the heart of the instant controversy. For present purposes, it suffices to note that the Sellers contend that upon the delivery into escrow of certificates evidencing 50% of the stock of the Company, the entirety of the $30 million was to be remitted to them, subject to their disbursement instructions. However, the agreement authorized Levine "to construe this Agreement and/or any written instructions or notices received by it, and such construction [was to] be binding on all parties" (*id.* at § 13.6).

In addition to the $30 million payment, "in order to pay [the Sellers] the book value of inventory on hand," the Artist House Agreement provided that Antiquorum S.A. would execute a promissory note in favor of an undetermined third-party for 16 million Swiss francs (CHF), payable within six months (Artist House Agreement § 2.4). Alternatively, Patrizzi himself would be "personally responsible for payment of the said CHF 16,000,000 to any Stockholder which is entitled thereto." Patrizzi understood this to mean that the proceeds would go to Habsburg or its designees (first Patrizzi affidavit, ¶ 15). The Artist House Agreement stated that it was understood and agreed that the sum would be paid from the sale of the inventory on hand as of the date of the agreement, and that Patrizzi would "ensure" that such inventory would be "offered for sale" within six months of the agreement's execution (Artist House Agreement § 2.4). Any proceeds in excess of the CHF 16,000,000 (the excess inventory proceeds) would belong to "Patrizzi or his designees" (*id.*).

In a separate agreement, entered into between Artist House and Patrizzi, Artist House retained Patrizzi to continue serving as the chief executive officer and chairman of the Company

(answer ¶ 98; affirmation of Michael Haskel, July 9, 2012 [second Haskel affirmation], exhibit Q [Consulting Agreement]). Zimmermann and Levine represented Patrizzi in the drafting and negotiation of this agreement (first Patrizzi affidavit, ¶ 8). Pursuant to the Consulting Agreement, Artist House hired Patrizzi to serve as the chief executive officer of the Company for a term of at least three years (Consulting Agreement § 1). Artist House could terminate Patrizzi's employment with or without just cause (*id.* at § 4[a]). In addition to other promised compensation or benefits, as partial consideration for Patrizzi's employment, "[u]pon fulfillment of Patrizzi's duties" an entity to be formed in the future and referred to as PatrizziCorp was to receive any Company stock held by Levine that had not been released to Artist House (*id.* at § 3[a][i]). In the interim, Levine was to hold such shares "for the benefit of Patrizzi or his designee," and PatrizziCorp would have the exclusive right to vote those shares (*id.* at §§ 3[a][i] & [d]). As with the Artist House Agreement, the Consulting Agreement granted Levine the power to construe the agreement and instructions as he saw fit (Consulting Agreement § 3[a][ii]). PatrizziCorp was never formed (first Patrizzi affidavit ¶ 29).

B. The Execution of the Distribution Agreement

Patrizzi felt that Zimmermann should be rewarded for his apparent loyalty and good work and agreed that upon Patrizzi's retirement from the Company, Zimmermann would receive half of whatever equity he retained in the Company (affidavit of Osvaldo Patrizzi, sworn to July 9, 2012 [second Patrizzi affidavit], ¶ 27). On January 23, 2006, Zimmermann and Levine presented Patrizzi with an agreement that they told him documented that promise (first Patrizzi affidavit, ¶ 18). Patrizzi avers that he does not "fully comprehend English, particularly the written word," and did not read the document or have it read to him (*id.*). Rather, he relied on Zimmermann and Levine, his attorneys, to inform him of its contents (*id.*).

The document, entitled "Stock/Sales Proceeds Distribution Agreement" (first Haskel affirmation, exhibit 14 [Distribution Agreement]), according to Patrizzi, overstepped. Not only did it transfer shares to Zimmermann, but it further provided that Patrizzi would split half of any excess inventory proceeds he received (Distribution Agreement § 2). Patrizzi claims that he never intended this (second Patrizzi affidavit, ¶ 28). Also, rather than deferring the transfer of the shares to Zimmermann until after Patrizzi's retirement, the agreement stated that Patrizzi and Zimmermann would become equal partners in the future company, which Patrzzi would irrevocably name as his designee for purposes of receiving the shares being held for PatrizziCorp under the Consulting Agreement (Distribution Agreement § 1). As noted above, this company was never formed (first Patrizzi affidavit, ¶ 21). Moreover, the Distribution Agreement contains a clause representing that Levine drafted the document as a mere accomodation to Zimmermann or Patrizzi, without representing either of them, and that both had been represented by independent counsel (*id.* at § 3). The clause goes on to state that Levine "has a personal economic interest in a portion of the distribution of the [excess inventory proceeds given] to Zimmermann" (*id.*). Patrizzi avers that he was not informed of these facts or representations and that he was not represented by independent counsel (first Patrizzi affidavit, ¶ 19). Patrizzi claims he relied on Levine's and Zimmerman's misrepresentations as to the document's contents and signed it.

C. Closing of the Transaction and the $2 Million Transfer

In December 2005 and January 2006, Artist House delivered $30 million into escrow (interpleader answer ¶ 53). Unbeknownst to the Sellers, Artist House also paid Zimmermann at least $1.5 million for his assistance in the transaction (first Patrizzi affidavit, ¶ 22; answer ¶ 127). Meantime, the Sellers tendered stock certificates to Levine which represented ownership

of more than 50% of Antiquorum though they have declined to specify the precise amount of shares actually delivered (*id.* at ¶ 107). Levine delivered shares representing such a 50% interest to Artist House and retained certain shares in escrow for Patrizzi's benefit (interpleader answer ¶¶ 108 & 111).

As for the funds, on January 24, 2006, the Sellers instructed Levine to disburse the escrowed funds in the following manner: (i) $2 million to Antiquorum S.A.; (ii) $4.9 million to Patrizzi; (iii) $201,560 to Levine; (iv) CHF 19.85 million to an entity known as Bronsstadet AB; (v) CHF 3 million to Patrizzi; and (vi) CHF 500,000 to an individual named Taro Yamakawa (*id.* at ¶ 54; Levine affidavit, sworn to May 11, 2012 [Levine affidavit], exhibit 23). He further was instructed to hold CHF 20.75 million in escrow (Levine affidavit, exhibit 23). Levine followed these instructions (first Patrizzi affidavit, ¶ 24). Though Patrizzi declines to explain how the remaining proceeds were to be distributed (*id.*), he maintains that Levine was to hold the remaining funds in escrow "exclusively" for Habsburg (interpleader answer at ¶ 60).

Nearly a year later, in December 2006, Antiquorum S.A. wired $2 million of inventory proceeds to Levine's escrow account (first Patrizzi affidavit, ¶ 31; affidavit of Leo Verhoeven, sworn to July 13, 2012 [third Verhoeven affidavit], ¶ 2 ["I sent [$2 million] to Levine from the proceeds from the sale of [the inventory] in 2006"]). However, to avoid taxation, the Company did not acknowledge that these funds were inventory proceeds. Rather, Leo Verhoeven, the Company's comptroller at the time and a principal of Habsburg, characterized the transfer as a loan (third Verhoeven affidavit ¶ 2) or a mistake (affidavit of Leo Verhoeven, sworn to July 9, 2012 [second Verhoeven affidavit], ¶ 45; Levine affidavit, exhibit 33). Either way, its return was necessary to avoid the feared tax consequences (second Verhoeven affidavit, ¶ 45 ["The $2 million needed to be returned to [Antiquorum S.A.] to avoid these tax consequences"]). The

Sellers contend that despite these mischaracterizations, Levine was aware that the funds were inventory proceeds and that they had been delivered to him to hold on behalf of Habsburg (*id.*).

D. The 2007 Shareholders Meetings

At a June 15, 2007 shareholders meeting for the Company, Levine took the position that the Distribution Agreement authorized Zimmermann to vote half of the shares that remained with Levine in escrow. The Sellers immediately objected that only Patrizzi had the right to vote those shares, but they were ignored (second Patrizzi affidavit ¶¶ 34-35). At a subsequent meeting on August 2, 2007, Zimmermann and Artist House, who together possessed a majority of shares, voted to remove Patrizzi as chairman of the Company (*id.* at ¶ 36). Then, on August 24, 2007, Zimmermann and Artist House voted to fire Patrizzi from his CEO position and remove him and Habsburg from the Company's board (*id.* at ¶ 37; answer ¶ 103). Patrizzi avers that he never received any of the compensation due him under the Consulting Agreement (first Patrizzi affidavit, ¶ 30).

E. Demands for Money and Disbursement of $2 Million

On November 1, 2007, some months after the Sellers' ouster, Levine received a letter from Patrizzi's attorney (interpleader answer ¶ 64; CPLR 3018[a]; Levine affidavit, exhibit 27). The letter demanded that Levine disburse $3,761,324.00 to his client, as additional consideration for Patrizzi's tender of 278 shares of Antiquorum S.A., which he assumed that Artist House believed to have taken place (Levine affidavit, exhibit 27). Levine responded by noting that according to the representations made in the Artist House Agreement, Patrizzi did not own any shares in Antiquorum S.A (interpleader answer ¶ 66; Levine affidavit, exhibit 28). He also noted that disputes existed between Artist House and Patrizzi and solicited responses from Artist

House and Zimmermann (Levine affidavit, exhibit 28). Habsburg and Patrizzi deny knowledge of any response by Artist House (interpleader answer ¶ 67). Levine did not release the funds.

In early 2008, Levine notified Patrizzi that Zimmermann had demanded the release of certain shares; Patrizzi objected (*id.* at ¶ 72). Then, on November 5, 2008, Habsburg, through its attorney, notified Levine that it intended to deliver 840 shares of Antiquorum S.A. to him and asked that Levine release the remaining funds to its attorney's bank account (*id.* at ¶ 74). The Sellers deny or disclaim knowledge of any objection to Habsburg's request by Antiquorum or Zimmermann (*id.* at ¶¶ 77–78). Levine again refused to release the funds.

On January 9, 2008, Levine received an email from a Swiss attorney claiming to represent Antiquorum S.A. (first Patrizzi affidavit, ¶ 32; first Haskel affirmation, exhibit 26). The email stated that the Company could find no basis for the $2 million deposit that had been wired to Levine in December 2006, and requested its return (first Patrizzi affidavit, ¶ 32). Habsburg and Patrizzi now objected to the return of the funds, with Patrizzi maintaining that the money was inventory proceeds (interpleader answer ¶ 152; fourth-party complaint ¶ 66). In October or November 2010, Levine returned the money to Antiquorum S.A., over the objections of Habsburg and Patrizzi (fourth-party complaint ¶¶ 71–72; interpleader answer ¶ 154).

F. Procedural History and the Instant Motions

The instant action was commenced on December 22, 2010, upon the filing of a summons with notice by Zimmermann, Antiquorum S.A., and AQ Asset, claiming to be the successor to Artist House. Levine, Habsburg and Patrizzi were named as defendants. A complaint was filed on August 11, 2011, which added Antiquorum USA as a plaintiff. That same day Levine filed his answer, asserting counterclaims and cross-claims and giving notice of an interpleader action.

Initially, the Sellers moved to dismiss both the main action and the interpleader. In the

alternative, they sought a stay of the actions pending an arbitration between some of the parties. The court denied the motion to dismiss or stay the interpleader action, and instead stayed the arbitration (*AQ Asset Mgt. LLC v Levine*, Sup Ct, New York County, Jan 20, 2012, Kornreich, J., index No. 652367/2010). Before the court could reach a decision on the motion to dismiss the main action, that motion was withdrawn (*AQ Asset Mgt. LLC*, Mar 26, 2012). The Sellers then answered both the main action and the interpleader action, asserting counterclaims and cross-claims. They simultaneously served a pleading styled a "Fourth Party Complaint" against Levine in his individual capacity and moved for partial summary judgment and a preliminary injunction, both of which were denied (*AQ Asset Mgt. LLC*, Aug 3, 2012).

Also, prior to the filing of the complaint herein, on April 7, 2011, Patrizzi filed suit in the federal district court for the Southern District of New York against Antiquorum S.A., Antiquorum USA, Zimmermann, an entity known as Bourne in Time, Inc., and William Rohr, essentially alleging trademark violations (*Patrizzi v Bourne in Time, Inc.*, case no. 11-CV-2386) (the federal action). On February 23, 2012, the defendants in the federal action filed an amended answer, which asserted counterclaims for breach of certain non-compete provisions in the Artist House and the Consulting Agreements (amended answer, Feb. 23, 2012, case no. 11-CV-2386). Patrizzi replied on March 12, 2012, and sought the dismissal or stay of the counterclaims on the theory that those claims were already being litigated here or in another litigation in Geneva (reply, Mar. 12, 2012, ¶ 40, case no. 11-CV-2386). He further asserted Zimmermann's breach of fiduciary duty as an affirmative defense (*id.* at ¶ 46).

II. Standard

A. Pleading Standards and Motion to Dismiss

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as

well as all reasonable inferences that may be gleaned from those facts (*Amaro v. Gani Realty Corp.,* 60 NY3d 491 [2009]; *Skillgames, L.L.C. v. Brody,* 1 AD3d 247, 250 [1st Dept 2003] [citing *McGill v. Parker,* 179 A.D.2d 98, 105 (1992)]; *see also Cron v. Harago Fabrics,* 91 N.Y.2d 362, 366 [1998]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, id.* [citing *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275 (1977)]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro,* 60 NY3d at 491). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames,* 1 AD3d at 250 [citing *Caniglia v. Chicago Tribune–New York News Syndicate,* 204 A.D.2d 233 (1st Dept 1994)]). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of NY,* 98 N.Y.2d 314, 326 [2002] [citations omitted]; *Leon v. Martinez,* 84 N.Y.2d 83, 88 [1994]).

B. Statute of Limitations and Relation Back

A cross-claim is defined as any cause of action in favor of a defendant against another defendant or a group that includes both third parties and defendants (CPLR 3019[b]). A cross-claim or counterclaim by a defendant is not barred under the applicable statute of limitations if it was not barred at the time of the interposition of the claims in the complaint (CPLR 203[d];

Alvarez v Attack Asbestos, Inc., 287 AD2d 349, 350 [1st Dept 2001]). In an action commenced by filing a summons with notice, this date is the date of filing (CPLR 304[a] & 203[c]).

Plaintiffs filed a summons with notice on December 22, 2010. All claims by Sellers against them are counterclaims and relate back to the filing date. Levine, "as Escrow Agent," was named as a defendant along with the Sellers in the original summons. The Court can find no authority for the idea that asserting claims against an individual "as escrow agent" prevents that individual's co-defendant from asserting cross-claims against him personally. Such a proposition would substantially undercut the policy of CPLR 1006 (d), which allows the various claims against a stakeholder in an interpleader action to be wholly unrelated to one another. Consequently, any claim asserted by the Sellers against Levine in any of their pleadings, including their "Fourth Party Complaint," is properly designated a cross-claim[1], which for the purposes of the statute of limitations relates back to December 22, 2010.

III. Discussion

A. Rescission of Distribution Agreement and Breach of Fiduciary Duty

Patrizzi seeks to have the Distribution Agreement rescinded. According to Patrizzi, in signing the agreement he had only intended that after his retirement from Antiquorum, Zimmermann would receive half of whatever equity interest Patrizzi had retained in the Company (first Patrizzi affidavit, ¶ 27). However, the agreement also gives Zimmermann a portion of the excess inventory proceeds and was used to authorize Zimmermann to vote half of Patrizzi's shares in 2007. Patrizzi maintains this was never his intention.

In general, one who signs an instrument is conclusively bound thereby, whether he read

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[1] Consequently, Levine need not serve a responsive pleading (CPLR 3011; Siegel, NY Prac § 227 at 375 [4th ed 2005]).

the instrument or not (*Pimpinello v Swift & Co.*, 253 NY 159, 162–63 [1930]). Nonetheless, where a signatory is unable to read English, he can avoid the agreement if he justifiably relied on someone else's representation of the document's contents (*id.* at 165). Here, Patrizzi claims that, as a native of Italy, he does not "fully comprehend English, particularly the written word" (first Patrizzi affidavit, ¶ 18). Rather, he relied on his alleged attorneys, Zimmermann and Levine, to explain the document to him and they failed to notify him of a number of the provisions therein, such as the agreement to split the excess proceeds. Further, Levine did not advise Patrizzi that he was not acting as his attorney or that the agreement stated that both Patrizzi and Zimmermann were relying on independent counsel, an assertion that Patrizzi denies (*id.* at ¶ 19). If this account is true, it would state adequate grounds for the rescission of the Distribution Agreement. Hence, plaintiffs' motion with respect to this claim (answer, fifteenth counterclaim) is denied. However, as Levine is not a party to the agreement, there can be no claim of rescission against him. Therefore, the claims against him in this regard (interpleader answer, seventh counterclaim; fourth-party complaint, eighth cause of action) should be dismissed.

If the Distribution Agreement was obtained fraudulently, it follows that the Sellers' removal from the management of the Company was the product of that fraud. Drawing all inferences in favor of the Sellers, as the court on this motion to dismiss must, it would appear that, but for the Distribution Agreement, Levine, Artist House and Zimmermann would never have taken the position that Zimmermann was entitled to vote half of the shares being held by Levine on Patrizzi's behalf. As a result, the claims for breach of fiduciary duty against Levine (interpleader answer, fourth counterclaim) and Zimmermann (answer, fourth counterclaim) have a limitations period of six years, insofar as such claims relate to the execution of the Distribution Agreement and the Sellers' subsequent ouster. These claims accrued in the summer of 2007 and,

thus, are timely. Similarly, the claims against Levine (fourth-party complaint, twelfth cause of action), Zimmermann (answer, nineteenth counterclaim) and AQ Asset (answer, fifth counterclaim) for aiding and abetting such breaches also are timely.

The Sellers' other claims for breach of fiduciary duty are either redundant or simply perplexing. The mere allegation that Levine assumed conflicting roles (interpleader answer, first "third" counterclaim) is not sufficient to state a claim for damages for breach of fiduciary duty without alleging a resulting harm (*Ulico Cas. Co.*, 56 AD3d at 10), which Sellers have failed to do. To the extent that damages can be inferred from the rest of the pleadings, this is a mere restatement of the prior claim for breach of fiduciary duty arising out of Sellers' ouster. Sellers also allege that Levine breached his duty to them *as their attorney* by interpreting the various agreement against their interests, by authorizing Zimmermann's vote, and for refusing to release the money he continues to hold in escrow. These claims seem to presuppose that in carrying out his escrow duties, Levine's clients were owed some sort of special consideration. But, once an escrow is created, the escrow agent becomes the fiduciary of *both* parties to the agreement, even when the escrow agent was a party's attorney for the transaction (*Director Door Corp. v Marchese & Sallah, P.C.*, 127 AD2d 735, 736 [2d Dept 1987]; *Grinblat v Taubenblat*, 107 AD2d 735 [2d Dept 1985]). An escrow agent may not be faulted for carrying out his obligations under the escrow agreement. The Sellers have asserted their claims against Levine for his alleged breach of his duties as an attorney in a separate pleading than their claims against him for breach of his duties as an escrow agent. The claims for breach of escrow agent duties are dismissed (fourth-party complaint, second, third, fourth causes of action).

Similarly, the first cause of action against Levine in the fourth Party complaint is dismissed. It alleges that Levine breached his duties as an attorney, but fails to state the grounds

for such claim, merely referring the reader to the body of the complaint itself. This might have been excusable if the Sellers did not go on to plead three, separate causes of action for breach of fiduciary duty with detailed allegations. The only logical conclusion is that the first cause of action was designed as a sort of catch-all and is merely duplicative of the second, third, and fourth causes of action.

B. Fraud

Sellers allege that Zimmermann did not disclose to them that Artist House was initially willing to pay $35 million and allowed the buyer to reduce its offer to $30 million (answer ¶¶ 149–52). The claim is based upon an internal Artist House accounting invoice, dated February 20, 2006, well after closing, in which the purchase price (mentioned incidentally in a memorandum on the invoice) was originally written as "$35M." This number was then crossed out and replaced with "$30M" (first Patrizzi affidavit ¶ 22; first Haskel affirmation, exhibit 21). No party claims any actual knowledge of any such initial offer. Absent the crossed-out entry, no evidence substantiates this claim. Rank speculation and groundless inference cannot serve as the basis for any claim, let alone a fraud claim; this cause of action (answer, sixth counterclaim) is dismissed.

C. Legal Malpractice

The Sellers allege that Levine and Zimmermann committed legal malpractice in their negotiation and drafting of various agreements in early 2006. Levine and Zimmermann argue that these claims are time-barred by the three years limitations period for malpractice (CPLR 214[6]). In response, Sellers contend that Levine's and Zimmermann's continuous representation of them tolled the limitations period.

Sellers' account of events, however, points to a break-down of the attorney-client relationship in August 2007 when Sellers became aware of their alleged betrayal (*see Estate of Merk v Rubenstein*, 18 AD3d 332 [1st Dept 2005] [requiring "clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney"]). Nevertheless, Sellers argue that a number of later communications demonstrate that Levine and Zimmermann continued to represent them (Sellers' brief 6–7).

These communications do not indicate an attorney-client relationship. The first is an email dated October 27, 2008, in which Levine warns the Sellers that they had wrongfully retained inventory proceeds (sellers' brief 6; second Haskel affirmation, exhibit A, Bates nos. 723–24). That email chain appears to concern inquiries made by an individual named Peter Kaestli, a representative of one of Habsburg's creditors, regarding the escrow account (second Haskel affirmation, exhibit A, Bates no. 725). Levine requested permission from the Sellers to disclose to Mr. Kaestli certain advice he had given them *in the past* regarding the disposition of the inventory proceeds, on the ground that *those* communications were privileged (*id.* at Bates no. 724). The mere unsolicited recapitulation of past advice for the purpose of obtaining a privilege waiver does not constitute the contemporaneous proffer of legal advice.

The Sellers also argue that the purpose of Levine's actual meeting with Kaestli in May 2009 was to assist Habsburg to satisfy its supposed continuing obligation to deliver shares under the Artist House Agreement, referring to an account of that meeting contained within an email to Leo Verhoeven (*id.* at Bates nos. 744–47). The account identifies Levine as the "escrow agent", and relays Levine's narrative of the history of the transaction and the escrow funds. No legal advice to anyone is attributed to him. In short, there is no indication that Levine himself believed or was believed by others to have been acting, at that time, as attorney to either one of

the Sellers. Rather, it appears that, as the depositary of the funds, he was simply supplying information about the escrow account to Habsburg's creditors.[2]

The post-August 2007 acts or communications by Levine are consistent with his role as a "neutral" escrow agent (*see* second Verhoeven affidavit, ¶ 53). Sellers, therefore, argue that Levine's continuing power as escrow agent to bind the parties to his construction of the Artist House Agreement "is so inextricably intertwined with his role as counsel to [Sellers] . . . that so long as he acts as escrow agent he remains counsel to [Sellers] as well" (sellers' brief 7). This argument is without merit. It is an attorney's job to provide his client with legal advice, not to bind all parties, clients or non-clients, as the ultimate arbiter of a contract. To the extent Levine assumed the latter responsibility, it could not have been as an attorney to Habsburg or Patrizzi, but rather as a supposedly neutral escrow agent acting on behalf of and with the consent of all the parties to the escrow agreement with the duty to treat all the parties to the agreement, whether they were his clients or not, in equal good faith. His continuing authority in this respect does not derive from any attorney–client relationship. Hence, Zimmermann's and Levine's legal representation of the Sellers ended no later than August 2007, and the claims for legal malpractice (answer, seventeenth counterclaim; fourth-party complaint, ninth and tenth causes of action) are dismissed as time-barred. Since all the causes of action in the fourth-party complaint that could have served as a basis for the forfeiture of Levine's legal fees are dismissed, the Sellers' prayer for that particular relief (fourth-party complaint, eleventh cause of action)

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[2] The Sellers' contention that a December 22, 2008 email from Zimmermann to Kaestli is evidence of Zimmermann's continuous representation of them merely shows that, to the extent Habsburg's interests were represented at all, they were represented by Kaestli, while Zimmermann was acting on behalf of Antiquorum S.A., or, as Kaestli put it, "your side" (second Hasekl affirmation, exhibit A, Bates no. 735).

is dismissed.

D. Disbursement of the $2 Million

The Sellers posit a number of causes of action stemming from Levine's return of $2 million to Antiquorum S.A. in 2010. They claim these funds were proceeds from the sale of inventory and were deposited with Levine to hold on their behalf. They seek recovery from Levine for disbursing those funds over their objections, alleging a breach either of the Artist House Agreement (interpleader answer, second "third" counterclaim) or of his fiduciary duties as an attorney (fourth-party complaint, fourth cause of action). They have alleged counterclaims of unjust enrichment, conversion and constructive trust against Antiquorum S.A. and Zimmermann (answer, eleventh, twelfth and thirteenth counterclaims).

However, as noted above, Sellers have not always taken the position that these funds represented inventory proceeds. Originally, Verhoeven characterized the transfer as a loan on Antiquorum's books, while also writing to Levine in July 2007 that the transfer had actually been an error and asking him to return the money (*supra*, part II [C]). Verhoeven now disavows these previous representations, claiming that they were lies which were only made for the purpose of avoiding taxes and that Levine knew at the time that this was the case.

Regardless of whether Levine was complicit in this scheme, if it was agreed that the funds would be deposited with Levine under false pretenses for the purposes of defrauding the government, the agreement between Sellers and Levine would be unenforceable. No cause of action can arise from an agreement which has been documented falsely for an illegal purpose (*Sabia v Mattituck Inlet Marina & Shipyard Inc.*, 24 AD3d 178, 179–80 [1st Dept 2005]; *Stone v Freeman*, 298 NY 268, 271 [1948]; *see also Pattison v Pattison*, 301 NY 65, 72–73 [1950] [no constructive trust results from breach of oral promise to reconvey property when purpose of

original conveyance was to defraud creditors]).

Then too, the breach of contract claim against Levine must be dismissed as no contract provides for his stewardship of the inventory proceeds. Sellers do not contest this observation, but rather point to a number of instances prior to his receipt of the funds where Levine advised them that they were contractually obligated to deposit any inventory proceeds in the escrow account (second Patrizzi affidavit, ¶ 21; second Verhoeven affidavit ¶ 44; second Haskel affirmation, exhibit A, Bates nos. 818–19). Sellers argue that Levine should be equitably estopped from retracting his previous position. But, it is an ancient maxim that he who comes into equity must come with clean hands (*Pattison*, 301 NY at 74). Ergo, Verhoeven may not disavow his previous representations as to the nature of these funds and simultaneously hold Levine to his previously expressed opinion. Since there is no contract which made Levine an escrow agent for the inventory proceeds, his disbursement of such proceeds was not a breach of his fiduciary duty as an escrow agent. For the foregoing reasons, all claims relating to these funds (answer, eleventh, twelfth and thirteenth counterclaims; interpleader answer, second "third" counterclaim; fourth-party complaint, fifth cause of action) must be dismissed.

E. Inventory Proceeds

Sellers allege that after their ouster, Antiquorum S.A., Zimmermann and Artist House wrongfully withheld CHF 16 million in inventory proceeds due Habsburg under the Artist House Agreement. They maintain that the failure to remit these proceeds to them gives rise to a claim for breach of contract against AQ Asset Management, as successor to Artist House (answer, third counterclaim). They also posit causes of action for conversion (against all three parties; answer, seventh counterclaim), unjust enrichment (against Antiquorum S.A.; answer, eighth

counterclaim) and the imposition of a constructive trust (against Antiquorum S.A. and Zimmermann; answer, ninth counterclaim).

While the inventory proceeds appear to have been part of the contractual purchase price, the stock purchase agreement does not make Artist House liable for its payment. Instead, the agreement provides two alternatives for payment of the value of the inventory to the sellers. First, Antiquorum S.A. could execute a promissory note for CHF 16 million, payable within six months of the date of the Artist House Agreement to some unnamed third party (Artist House Agreement § 2.4), and Patrizzi was to ensure that the inventory would be sold prior to the maturity date of the promissory note (*id.*). Alternatively, Patrizzi was to be personally liable for the payment of the inventory proceeds (*id.*). Therefore, under the contract, only two persons could possibly be liable for failure to pay the inventory proceeds: Antiquorum S.A. and Osvaldo Patrizzi. The contract imposes no duty on Artist House to pay CHF 16 million to the Sellers and places the sole responsibility for the sale of the inventory on Patrizzi. Sellers' breach of contract claim against Artist House (answer, third counterclaim) is dismissed.

Sellers' claims for conversion and unjust enrichment also are problematic. Conversion is the unauthorized assumption of ownership over goods or identifiable money belonging to another (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 [1st Dept 1982]). An action for conversion cannot be predicated on a mere breach of contract (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268, 269 [1st Dept 2003]; *Peters Griffin Woodward, Inc.*, 88 AD2d at 884). Thus, where the plaintiff's claim of right is based not on his actual prior "ownership, possession or control" of the property, but rather on a contractual promise, "no action in conversion can be brought" (*Peters Griffin Woodward, Inc.*, 88 AD2d at 884). It is similarly well established that an unjust

enrichment claim is barred by the existence of a valid contract governing the subject matter (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]; *Adelaide Prods., Inc. v BKN Intl. AG*, 38 AD3d 221, 225 [1st Dept 2007]; *Singer Asset Fin. Co. v Melvin*, 33 AD3d 355, 358 [1st Dept 2006]).

Here, Sellers' claim to the inventory proceeds is based entirely on the Artist House Agreement. The proceeds are money that allegedly is *owed* to them under the contract, not money that belonged to them independent of the contract. In consequence, an action for conversion would be inappropriate. The existence of the Artist House Agreement also precludes any claim for unjust enrichment. It does not matter that Antiquorum S.A. was not a party to that agreement (*Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003]; *Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313, 313 [1st Dept 1995]). Accordingly, the claims for conversion and unjust enrichment (answer, seventh and eighth counterclaims) are dismissed.

Sellers request for the imposition of a constructive trust on the inventory proceeds, however, remains. The imposition of a constructive trust on property is appropriate where, despite the fact that the property may have been legally transferred from one party to another, equity demands that the transferee be denied the beneficial interest in the transferred property (*Sharp v Kosmalski*, 40 NY2d 119 [1976]; *Panetta v Kelly*, 17 AD3d 163, 165 [1st Dept 2005]). While the traditional relevant factors are "the existence of a confidential or fiduciary relationship, a promise, express or implied, a transfer in reliance on that promise and unjust enrichment" (*Majer v Schmidt*, 169 AD2d 501, 502 [1st Dept 1991]; *see also Sharp*, 40 NY2d at 121), the circumstances under which a constructive trust is appropriate "is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them" (*Kaufman*, 307 AD2d at 127, quoting *Latham v Father Divine*, 299 NY 22, 27 [1949]). Here, drawing all inferences in favor of Sellers, it would appear that while the

parties chose to formally leave legal title to the inventory with Antiquorum S.A. and though the only person with a contractual obligation to pay was Patrizzi himself, nevertheless, it was assumed that the Company would not prevent Patrizzi from using the inventory proceeds to fund his obligation to Habsburg. The provision stating that Patrizzi would be entitled to any excess proceeds over CHF 16 million only reinforces this interpretation. Assuming the foregoing is accurate and taking as true the allegations that Sellers lost control of the Company only through the treachery of their former attorneys, to allow the Company and its current shareholders to enjoy the inventory proceeds would be to let the alleged conspirators enjoy the fruits of their fraud. On the whole, this is the result which the remedy of constructive trust is meant to prevent. Plaintiffs' motion to dismiss the cause of action for a constructive trust, is denied (answer, ninth counterclaim).

F. Judiciary Law § 487

Sellers have asserted causes of action against Zimmermann under Judiciary Law § 487 for not revealing to the court that he was their attorney and that he had a conflict of interest in representing them (answer, ¶ 243). They seek to hold Levine liable under the same statute for not disclosing to the court his ongoing business relationship with Zimmermann, which, they argue, created a conflict with his former clients and influenced his interpretation of the contracts at issue (answer interpleader, ¶¶ 180–83; fourth-party complaint,¶¶ 89–92).

Judiciary Law § 487 penalizes attorneys who mislead a tribunal. An omission of an adverse fact by an attorney arguing his own case can constitute deception where the fact is so crucial that its admission would render judgment in the client's favor impossible (*e.g., Schindler v Issler & Schrage, P.C.*, 262 AD2d 226 [1st Dept 1999] [liability found under § 487 where attorney obtained judgment declaring client owner of bank account without disclosing that

client's rights to account were subject to Arizona probate proceeding]). However, the law does not require attorneys to argue the positions of their adversaries. The alleged fact that Zimmermann was Sellers' former lawyer, who allegedly acted adversely to their interests, does not necessarily mean that his claims against defendants must fail. Congruently, the allegation that Levine has an ongoing business relationship with Zimmermann simply has no bearing on the validity of his interpleader complaint, which merely serves to notify the court and the parties of the various claims made on the property in his possession. These allegations form the backbone of Sellers' claims and defenses, but they do not render the other parties' pleadings dishonest. In any event, Zimmerman's or Levine's "assertion of unfounded allegations in a pleading, even if made for improper purposes, does not provide a basis for liability under Judiciary Law § 487" (*Ticketmaster Corp. v Lidsky*, 245 AD2d 142, 143 [1st Dept 1997]). Furthermore, Zimmermann here is not acting as a lawyer. "[Section 487] applies to an attorney acting in his or her capacity as an attorney, not to a party who is represented by counsel and who, incidentally, is an attorney" (*Oakes v Muka*, 56 AD3d 1057, 1058 [3d Dept 2008]). Therefore, the Section 487 causes of action (answer, sixteenth counterclaim; interpleader answer, sixth counterclaim; fourth-party complaint, seventh cause of action) are dismissed.

G. Accounting

Sellers seek an accounting from both Zimmermann, as their attorney, and Levine, as their attorney and escrow agent (answer, fourteenth counterclaim; interpleader answer, fifth counterclaim; fourth-party complaint, sixth cause of action). The statute of limitations for an equitable accounting is six years from the time the fiduciary relationship is openly repudiated or otherwise comes to an end (*Westchester Religious Inst. v Kamerman*, 262 AD2d 131 [1st Dept 1999]). These claims are timely.

H. Breach of Consulting Agreement

Plaintiffs argue that the counterclaims for breach of the Consulting Agreement (answer, first counterclaim) indemnity (answer, second counterclaim) or those based on allegations that Patrizzi's termination was improper or tortious (answer, third, fourth, fifth and tenth counterclaims) should be dismissed or stayed as those issues have been raised in the federal action. Plaintiffs point to Patrizzi's eighth affirmative defense in the federal action, where Patrizzi objected to plaintiffs' counterclaims on the ground that they were the subject of this litigation or litigation in Geneva, as well as his twelfth affirmative defense therein, based on Zimmermann's alleged breach of fiduciary duty.

A court may "make such order as justice requires" where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States" (CPLR 3211[a][4]). However, the counterclaims which plaintiffs seek to dismiss are not asserted by Patrizzi in the federal action. Contrary to plaintiffs' contention, in the federal action, Patrizzi merely stated that some of the counterclaims there alleging Patrizzi's breach of certain non-compete provisions had or would be raised herein. The federal defendants' non-compete counterclaims are distinguishable from Sellers' counterclaims which plaintiffs seek to set aside. Moreover, the two sets of claims are based on separate operative facts. The fact that Patrizzi has raised Zimmermann's alleged breach of fiduciary duty as an *affirmative defense* does not warrant the dismissal of the actual *claims for relief* herein based on those allegations. To dismiss Sellers' counterclaims on that basis would essentially deny them a forum where they could seek to hold plaintiffs liable. It also would be inappropriate to stay Sellers' counterclaims based on the mere *possibility* that some of the facts underlying those counterclaims are to be litigated in the federal action. Accordingly, this branch of plaintiffs' motion is denied.

Nonetheless, Sellers' claim for tortious interference with contract (answer, tenth counterclaim) is dismissed on the separate grounds that it is time-barred. Sellers assert this cause of action against Antiquorum S.A. and Zimmermann, claiming that they "orchestrat[ed] Patrizzi's termination and the diminution of [Sellers'] interest in the Antiquorum Companies in breach of the [Artist House Agreement] and the Consulting Agreement" (answer ¶ 184). As an injury to property, claims for tortious interference with an existing contract must be commenced within three years of accrual (CPLR 214[4]; *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]). Patrizzi's termination took place in August 2007, more than three years before this action commenced in December 2010. Sellers reference to the "diminution" of their interest, which allegedly took place in February 2008 (*see* sellers' brief 20), does not aid them, as neither the pleadings nor the affidavits give any account of what event they are referring to, nor is it explained how such "diminution" constituted a breach of either agreement.

In sum the following causes of action remain: (I) rescission of the Distribution Agreement (answer, fifteenth counterclaim); (ii) breach of fiduciary duty or aiding and abetting a breach of fiduciary duty against Levine, Zimmermann and Artist House (answer, fourth, fifth and nineteenth counterclaims; interpleader answer, fourth counterclaim; fourth-party complaint, twelfth cause of action); (iii) equitable accounting from Levine and Zimmermann (answer, fourteenth counterclaim; interpleader answer, fifth counterclaim; fourth-party complaint, sixth cause of action); (iv) imposition of a constructive trust on the inventory proceeds (answer, ninth counterclaim) and (v) breach of the Consulting Agreement and enforcement of the indemnity provisions contained therein or in the Artist House Agreement (answer, first and second counterclaim). Also outstanding from the sellers' pleadings are the questions of who owns the

property being held by Levine in escrow and their cross-claim against Levine for any and all liability they may incur in this action. Accordingly it is

ORDERED that the motion of defendant Michael Levine to dismiss the fourth-party complaint of defendants Osvaldo Patrizzi and Habsburg Holdings Ltd. and the third through seventh counterclaims asserted by Osvaldo Patrizzi and Habsburg Holdings Ltd. in their answer to the interpleader complaint is granted in part and the first, second, third, fourth, fifth, seventh, eighth, ninth, tenth and eleventh causes of action in the fourth-party complaint and the first "third", second "third", sixth and seventh counterclaims in the answer to the interpleader complaint are dismissed; and it is further

ORDERED that the motion of plaintiffs AQ Asset Management LLC, Antiquorum S.A., Antiquorum USA, Inc., and Evan Zimmermann to dismiss the counterclaims of defendants Osvaldo Patrizzi and Habsburg Holdings Ltd. is granted in part and the third, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, sixteenth, and seventeenth counterclaims are dismissed, and the plaintiffs are directed to reply to the remaining counterclaims within 20 days of this order with notice of entry; and it is further

ORDERED that that the caption of this action shall be amended to read as follows:

----------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-

MICHAEL LEVINE, HABSBURG HOLDINGS LTD. and OSVALDO PATRIZZI

Defendants.

----------X
MICHAEL LEVINE,

Cross-claim plaintiff,

-against-

OSVALDO PATRIZZI, SIMON LEO VERHOEVEN,
KERRY GOTLIB and MICHAEL HASKEL,

Cross-claim defendants.
----------X

and it is further

ORDERED that plaintiffs shall serve a copy of this order on the Clerks of the Court and the Trial Support Office, Room 158M, who are directed to note the amended caption in their records.

Dated: March 28, 2013

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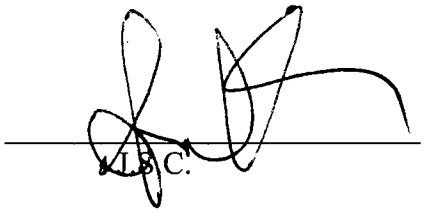

J.S.C.