SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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HOLDRUM INVESTMENTS N.V. *individually and derivatively on behalf of* MUSEUM PARTNERS L.P.

Index No. 650950-2011

Plaintiffs,

-against-

ASHER B. EDELMAN

Defendant.

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO DISMISS

Plaintiff, HOLDRUM INVESTMENTS N.V. *individually and derivatively on behalf of* MUSEUM PARTNERS L.P., respectfully submits this Memorandum of Law in support of its motion: (i) pursuant to CPLR § 3212, for summary judgment in favor of the Plaintiff; (ii) striking the Answer, Affirmative Defenses; and (iii) for such other and further relief as this Court deems just, proper and equitable.

The terms defined in the Affirmation of Jeff Davis submitted in support of this motion are incorporated by reference herein. The Verified Second Amended Complaint is also set forth in lieu of an affidavit pursuant to CPLR 105(u). A copy of the Second Amended Complaint is annexed hereto as **Exhibit "1"**.

PRELIMINARY STATEMENT

The Original Partnership Purpose

As discussed at length in the Verified Second Amended Complaint, Museum Partners LP (the "Partnership") was formed for the purpose of acquiring a substantial position in Societé du Louvre (hereinafter "Louvre"), a French publicly-traded company that was controlled by the Taittinger family.

It is uncontested that the holdings of Louvre included Taittinger Champagne, Banque du Louvre (a French investment company and bank), Baccarat Crystal, and several French hotel chains, including Le Crillon Hotel.

It is also uncontested that the Defendant Edelman is a widely-recognized investor known for his "activist" and aggressive methods of acquiring a recognized shareholder interest in undervalued publicly-traded companies. After acquiring such an interest, Edelman is known for pressuring or "shaking up" the board of directors and the shareholders to create shareholder value by making changes to the company's management structures. It is generally agreed between the parties that the ultimate goal of this strategy has been to force fundamental changes within the target

company to elevate the value of the then-undervalued shares. Furthermore, Defendant's investment strategy often forced companies to buy out his investment interest, once acquired, in order to avoid having to make considerable changes to the management structure that might otherwise compromise the control of certain shareholders. See Pomeranz v. Museum Partners LP 2005 WL 217039, 1 (Del. Ch. 2005).

Therefore, in the present case, the investment goal was to obtain a sizable interest in Louvre in order to attract public attention, precipitate proxy fights, put political pressure on the board of directors of Louvre to change the management structure, and effect actions of divestiture, all in order to maximize shareholder value.

Defendant believed and represented to Holdrum that, based on considerable research, Louvre was severely undervalued in the public market, in large part due to the fact that Louvre was predominantly controlled by a single family, the Taittingers. The members of the Tattingers were allegedly being paid exorbitant salaries while doing very little work, to the detriment of the shareholders as well as the value of the publicly-traded shares. Holdrum relied substantially on Defendant's reputation and investment strategies in deciding to invest in the Partnership.

Once Defendant made investments in Louvre the stock price rose as one might expect. However, Defendant's investment strategy was not as successful as he had hoped because the board of directors was unmoved and unwilling to change the management structure, and court proceedings in France were all decided in favor of the Taittinger control group Neither was the Taittinger family willing to relinquish control.

The Extended Partnership Purpose

Because the Taittinger family was unwilling to relinquish control as discussed above, the Defendant decided to commence a derivative lawsuit in France against the Taittinger family. It is

uncontested that said lawsuit ultimately failed. Thereafter, upon information and belief the Defendant began to sell the Partnership's holdings and distribute cash to some of the Partners.

Defendant further decided to commence a lawsuit against the Taittinger family in New York Federal Court for substantially the same reasons upon which the lawsuits in France were based. A copy of the decision and order in New York Supreme Court is annexed hereto as **Exhibit "2".**

Said New York lawsuit was commenced despite the fact that some limited Partners opposed it because it was not consistent with the stated purpose of the Partnership and despite the fact that it was likely frivolous from the outset due to jurisdictional and full faith and credit issues. Therefore, it was not surprising that said suit was similarly unsuccessful, its end coming in the form of a dismissal.

In addition, the Defendant filed suit against Starwood group, alleging use of information received under confidentiality. Finally however, on or about July of 2010, the Court of Appeals denied Defendant's request for leave to appeal with respect to the Starwood suit in New York . At that time, the Partnership unquestionably no longer served any purpose whatsoever and the Defendant thus had a responsibility to wind down the affairs of the Partnership and distribute the assets to the limited Partners as per Delaware law.

Despite the facts that the Partnership has long been dissolved under the Partnership Agreement, that it is no longer operating for its intended purposes, and that the Defendant allegedly continues to use Partnership assets for his own personal benefit (although this latter allegation is not dispositive), the Partnership has never officially wound down its affairs. The Partnership remains an active entity according to the Secretary of State's records, and its net assets have to date not been distributed to the Partners as required by statute.

STANDARD OF REVIEW ON MOTION FOR SUMMARY JUDGMENT

It is well settled that a motion for summary judgment should be granted, where, as here, no questions of material fact exist which would preclude the award of judgment to the movant. CPLR

§3212 (Upon all the papers and proof submitted, the cause of action or defenses shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of the moving party.).

If the non-moving party fails to demonstrate the existence of any triable questions of fact, judgment should be entered in favor of the moving party. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980); *Marrero v. Teller Development Corp.*, 303 A.D.2d 284, 755 N.Y.S.2d 616 (1st Dept. 2003).

Applying this standard to the facts of the case at bar, it is respectfully asserted that there are no factual issues to determine which would preclude the Plaintiff's entitlement to the statutory and equitable remedies being sought herein.

PLAINTIFF IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON ITS SEVENTH CAUSE OF ACTION SEEKING DISSOLUTION OF THE LIMITED PARTNERSHIP

§ 17-801 of the Delaware Limited Partnership statute provides as follows:

> "A limited Partnership is dissolved and its affairs shall be wound up upon the first to occur of the following:
>
> **At the time specified in a Partnership agreement**, but if no such time is set forth in the Partnership agreement, then the limited Partnership shall have a perpetual existence;
>
> ...
>
> (5) **Upon the happening of events specified in a Partnership agreement**; or
>
> (6) **Entry of a decree of judicial dissolution** under § 17-802 of this title."

Moreover, § 17-802 states:

> "On application by or for a Partner the Court of Chancery may decree dissolution of a limited Partnership whenever it is not reasonably practicable to carry on the business in conformity with the Partnership agreement."

Even §17-803 grants the court the discretion to order the affairs of the Partnership be wound down:

"The Court of Chancery upon cause shown, may wind up the limited Partnership's affairs upon application of any Partner"

In this case there is no question of fact (1) that the Partnership no longer serves any purpose and (2) that the events or time specified in the Partnership Agreement mandate a decree of dissolution.

In fact, Section 8.1(d) of the Museum Partners Limited Partnership Agreement provides that the Partnership be dissolved no later than **December 31, 1998.** A copy of the Partnership Agreement is annexed hereto and made a part hereof as **Exhibit "3".** Thus, at that time, Defendant technically came under an obligation to wind down the affairs of the Partnership and distribute the assets to the limited Partners.

However as discussed above, the Partnership was extended for the **specific, sole and limited purpose** of pursing litigation related to the original purpose of the Partnership. It is uncontested that said litigation failed and all appeals have been denied. The Partnership therefore no longer serves any purpose and the general Partner (the Defendant) must now wind down the affairs of the Partnership and return the contributions of the limited Partners pursuant to DRUPLA § 17-804. [1]

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[1]DRUPLA § 17-804 states: "(a) Upon the winding up of a limited Partnership, the assets shall be distributed as follows: To creditors, including Partners who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited Partnership (whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to Partners and former Partners under § 17-601 or § 17-604 of this title;(2) Unless otherwise provided in the Partnership agreement, to Partners and former Partners in satisfaction of liabilities for distributions under § 17-601 or § 17-604 of this title; and(3) **Unless otherwise provided in the Partnership agreement, to Partners first for the return of their contributions and second respecting their Partnership interests, in the proportions in which the Partners share in distributions."**

Plaintiff posits that the sole purpose of not winding down the Partnership is a blatant, unjustified and improper attempt to impair and impede upon the rights given to the minority interest holders to an accounting and reimbursement of their investments.

Plaintiff is therefore entitled to a decree of dissolution and a Judgment promptly winding down the Partnership and promptly distributing the funds.

PLAINTIFF SHOULD BE GRANTED PARTIAL SUMMARY JUDGMENT ON ITS FIFTH CAUSE OF ACTION FOR AN ACCOUNTING

Plaintiff's Fifth Cause of Action seeks an accounting. A copy of the Second Amended Complaint is annexed hereto as **Exhibit "1"**. UPA § 43 clearly establishes an unqualified right to an accounting **after** Partnership dissolution.[2]

Therefore should the Court grant the Plaintiff's application seeking a decree of dissolution of the Partnership, the Court must also as a matter of law grant the Plaintiff's demand for an accounting, compel the Defendant to permit Plaintiff to inspect all of the books and records of the Partnership and compel the Defendant to produce copies of the Partnership's financial statements and Partnership records. Additionally, the Defendant must account for his official conduct as a general partner and account for the disposition of the Partnership funds and any Partnership property of which the Defendant is a legal custodian.

DEFENDANTS' ANSWER HAS NO BASIS IN LAW OR FACT

It is respectfully submitted that the Answer is devoid of both legal and factual efficacy and is therefore insufficient to defeat the Plaintiff's Motion for Summary Judgment. The Answer does not assert any factually supported affirmative defenses to this action and only contains general denials of

[2]UPA §42 also states: "The right to an account of his interest shall accrue to any Partner, or his legal representative, as against the winding up Partners or the surviving Partners or the person or Partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary."

all substantive allegations in the Complaint, and as such, is insufficient to defeat Plaintiff's motion to dismiss/summary judgment.

CPLR Section §3013 states that, "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense". One of the leading cases interpreting the requirements of CPLR 3013 is *Foley v. D'Agostino*, 248 N.Y.S.2d 121. Foley noted that the basic requirement is that the pleadings identify the transaction and indicate the "theory of recovery" with sufficient precision to enable the Court to control the case and the opponent to prepare. *Id.* At 125.

In this case, the Defendant's affirmative defenses fail to reasonably indicate the "theory of recovery" and fail to identify with any reasonable particularity the factual basis for the Defendant's position, sufficient to provide Plaintiff with adequate notice or opportunity to prepare an opposition.

As a Second Affirmative Defense, Defendant claims that Plaintiff's claims are barred by doctrines of laches, waiver, ratification and estoppel. Defendant's Second Affirmative Defense is nothing more than an unsubstantiated conclusory allegation that does not raise a triable issue of fact precluding summary judgment. See, Home Sav. Bank v. Schorr Bros. Development Corp., 213 A.D.2d 512, 624 N.Y.S.2d 53 (2 Dep't.,1995). (Defendants conclusory and unsubstantiated assertions of defenses to mortgage foreclosure were not supported by competent evidence, and, thus, were insufficient to defeat motion for summary judgment filed by mortgagee). The Defendant's allegations that the Plaintiff is estopped and/or has waived its claims lack any detail as to what the Plaintiff is estopped from doing, or exactly how the Plaintiff has waived or ratified its claims.

The same goes for the Third Affirmative Defense which alleges that "the second amended complaint is barred by the culpable conduct of the Plaintiff" without alleging a single factual allegation that relates to the Plaintiff's claims.

The fifth affirmative defense merely alleges "payment" as a defense. Not only is this not a valid defense generally (absent perhaps some express agreement between the parties) but the Defendant has failed to show how "payment" forms a defense to any of the substantive allegations in the complaint.

Likewise, the sixth affirmative defense is also deficient. It alleges that the Plaintiff's claims are barred by the doctrine of unclean hands. Defendant fails to state or show any inequitable conduct by the Plaintiff therefore this affirmative defense is not valid.

The seventh affirmative defense states in the most conclusory of terms that the Plaintiff engaged in some purported deceitful conduct. Once again, Defendant has failed to state any conduct which could be deemed deceitful and thereby would form a defense in this action.

Lastly, the eighth affirmative defense states that the Plaintiff's claims are barred by the terms of the Partnership Agreement. Defendant failed to identify any terms or sections in the Agreement which would support their assertions. Again, the Defendant has failed to formulate a basic defense or one to which the Plaintiff can adequately form a response.

Quite simply, the above affirmative defenses fail to identify the transactions or occurrences for which said defenses are based upon and fail to state the claim. All of these claims are facially insufficient and should be dismissed, as they consist solely of solitary conclusions of law that are not supported by any facts. *See Falk v. Gallo,* 18 Misc.3d 1146(A), 2008 WL 638419, *4 (Sup. Ct. N.Y. County Feb. 25, 2008) (dismissal of defenses of estoppel, unclean hands, failure of consideration and

breach of contract, because among other deficiencies, they were merely "single sentence conclusions without any supporting factual basis"). Such single-sentence pleading is wholly improper on a practical level as it fails to inform the Plaintiff (and this Court) of the underlying bases for most, if not all, of the affirmative defenses. Under New York law, where a Defendant raises affirmative defenses or counterclaims in answering a complaint, "[c]onclusory assertions alone are insufficient to defeat a motion for summary judgment." *Otterbourg, Steindler, Houston & Rosen, P.C. v. Shreve City Apts., Ltd.*, 147 A.D.2d 327, 334 (1st Dep't 1989); *see also Robbins v. Growney*, 229 A.D.2d 356, 358, 645 N.Y.S.2d 791(1st Dep't 1996) (holding that "bare legal conclusions are insufficient to raise an affirmative defense"); *Clifton Country Road Assocs. v. Vinciguerra*, 195 A.D.2d 895, 897, 600 N.Y.S.2d 982, 983-84 (3d Dep't 1993) (affirming trial court's grant of summary judgment and dismissal of "conclusory allegations [were] insufficient to support affirmative defense of unclean hands"); *Bankers Trust v. McFarland*, 192 Misc. 2d 328, 335, 743 N.Y.S.2d 804, 809-10 (N.Y. Sup. Ct. 2002) (granting summary judgment and dismissing affirmative defenses and counterclaim where Defendant offered no evidence to support its conclusory allegations); *Lopez v. 352 Cathedral Equities, Inc.*, N.Y.S.2d, 1994 WL 130907, at *7 (N.Y. Sup. Ct. 1994) (granting summary judgment and holding that conclusory and unsubstantiated allegations could not sustain Defendants' affirmative defense).

CPLR **3211(b)** allows a party to move for dismissal of a defense because it either **fails to articulate a valid defense** or it lacks merit. Similar to CPLR 3211(a)(7), a defense will be dismissed where, assuming the truth of the factual allegations, there exists no legal or factual basis for asserting the defense. *See Matter of Ideal Mutual Ins. Co. v. Becker*, 140 A.D.2d 62, 67 (1st Dept. 1988). Moreover, where affirmative defenses are pled as conclusions of law and are not supported by any facts, the defenses **must** be dismissed. *See 170 West Village Associates v. G&E Realty, Inc.*, 56 A.D.3d 372 (1st Dept. 2008) ("[the] challenged affirmative defenses, which pled conclusions of law without supporting facts, were properly stricken as insufficient.").

Here, the utter lack of factual background or foundation sets forth a group of defenses that have not been stated or are mere conclusions of law. A copy of the Verified Answer with Counterclaims is annexed hereto and made a part hereof as **Exhibit "4"**. As such the above affirmative defenses 2 through 8 must be dismissed.

CONCLUSION

Based on the foregoing it is respectfully requested that this Court should issue an order: (i) granting Partial Summary Judgment pursuant to CPLR §3212, on the Plaintiff's Fifth and Seventh Causes of Action and (ii) dismissing the Defendant's second through eighth affirmative defenses pursuant to CPLR 32122(b), in addition to granting Plaintiff costs, disbursements and attorney's fees and any such other and further relief as the Court may deem just and proper under the circumstances or pursuant to statute.

Dated: July 6, 2012

New York, New York

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By:_____

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