

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/21/13
ADJ. DATES 3/22/13
Mot. Seq. # 001 - MD
CDISP Y N X
Prelim. Conf. Scheduled: 6/6/13

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EDWARD R. GULMI, individually and as a :
shareholder of Gulgard, Inc., a New York Corp., :
 :
Plaintiff, :
 :
-against- :
 :
JAMES J. GARDNER, TARA GARDNER. EJS :
MANAGEMENT, LLC, a Delaware Limited :
Liability Company, and GULGARD, INC., a :
New York Corporation, as a nominal Defendant :
sued derivatively, :
 :
Defendants. :
-----X

DONALD J. SCHUTZ, ESQ.
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Upon the following papers numbered 1 to 9 read on this motion by the plaintiff for preliminary injunctive relief and summary judgment on certain claims; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 5-7; Replying Affidavits and supporting papers 8; Other 9 (Declaration); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#001) by the plaintiff wherein he seeks preliminary injunctive relief is considered under CPLR 6311 and is denied; and it is further

ORDERED that the remaining portions of the plaintiff's motion wherein he seeks summary judgment on portions of his FIRST cause of action and on his FIFTH and SEVENTH causes of action set forth in his complaint is considered under CPLR 3212 and is denied; and it is further

ORDERED that pursuant to CPLR 3212(b), the defendants are awarded reverse summary judgment dismissing the following causes of action: 1) those portions of the FIRST cause of action at subparagraph b thereof, wherein, the plaintiff demanded a judicial declaration of Gulgard's entitlement to the defendants' Iron Castle stock and at subparagraph d thereof directing the defendatns to disgorge all profits and money received by, through and/or in relation to Iron Castle and/or 50% of such amounts directly to Gulmi; 2) the plaintiff's FIFTH cause of action; and 3) the plaintiff's SEVENTH cause of

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action, all without prejudice to the rights of the bankruptcy trustee to reassert one or more of them in this action, upon his substitution and the grant of leave to amend the complaint, if any, or in any other action he may commence; and it further

ORDERED that, pursuant to CPLR 3211(e), the causes of action upon which reverse summary judgment have been awarded to the defendants are severed from those unaffected by such an award and the defendants, *may*, should they be so advised, settle a judgment reflecting the severance herein directed and the award of reverse summary judgment dismissing the claims of the plaintiff set forth in the subparagraphs b and d of the FIRST cause of action to the extent set forth above and dismissing the FIFTH and SEVENTH causes of action, without prejudice to the rights, if any, of the bankruptcy trustee to re-assert them; and it is further

ORDERED that a preliminary conference shall be held with respect to the claims remaining herein at 9:30 a.m. on Thursday, **June 6, 2013** in the courtroom of the undersigned located at the Supreme Court Annex Building of the courthouse at One Court Street, Riverhead, New York 11901, at which, counsel shall appear ready to confer with the court.

The plaintiff commenced this action on December 31, 2012 by the electronic filing of his summons and complaint. Therein, he claims to be a 50% shareholder with defendant, Tara Gardner, in Gulgard, Inc., a New York corporation they formed in April of 2010. They, along with defendant James J. Gardner, are the directors/officers of such corporation. The business in which Gulgard, Inc. (hereinafter "Gulgard"), was engaged included international mineral and coal mining, the marketing of commodity transactions and related business opportunities.

In the spring of 2012, defendant James J. Gardner, on behalf of Gulgard, began negotiating with individuals in Chile regarding the development, by purchase or otherwise, of mining rights to lands in Chile. The plaintiff claims that under a Binding Letter of Intent to Acquire dated March 1, 2012, Gulgard had an option to purchase certain land in Chile. By its terms, the option expired on April 31, 2012 and Gulgard apparently failed to exercise its option prior to the date. Under an agreement dated May 12, 2012 that was negotiated by defendant James J. Gardiner on behalf of Gulgard and Hugo Castillo and others with land and/or mining rights in Chile, a new venture aimed at an iron ore exploration and development over certain Chilean lands was agreed to. Thereunder, Gulgard was entitled to receive 80% of the shares in a new corporation to be formed by Gulgard and others with interests in the lands and/or iron mines (*see* page 5 of the complaint). On June 8, 2012, Gulgard paid \$2,800.00 to register the mining of one parcel owned by Castillo and allegedly paid Castillo the sum of \$25,000.00. In July of 2012, Gardner, Castillo and others formed Minera Iron Castle Mining, S.C.M (hereinafter "Iron Castle").

However, defendant James J. Gardner, purportedly took, in his own name, the 80% interest that Gulgard was allegedly entitled to receive under the May 12, 2012 agreement. The plaintiff claims that Gardiner explained this action as necessary under Chilean law which purportedly prohibited corporations, such as Iron Castle, from having ownership interests in corporations (*see* page 6 of the complaint). Gardner is further alleged to have represented that he would transfer 50% of the 80% stock ownership in Iron Castel he took title to, personally, and that the plaintiff and Gardiner would thereafter form separate personal limited liability companies "to mirror the 50/50 ownership interest the plaintiff and defendant Tara Gardiner had in Gulgard" (*see* pages 6-7 of the complaint). The court notes,

however, that this suggested course of conduct is inconsistent with the notion that Chilean law prohibited corporate ownership in mining companies such as Iron Castle.

Continuing, the plaintiff alleges that in August of 2012, two investors named Morely allegedly loaned Iron Castle some \$1,250,000.00. In exchange, defendant, James J. Gardner, who personally held that 80% interest in Iron Castle and the other parties that owned the remaining interests therein, allegedly agreed to give the Morelys, Gardner and the plaintiff 17.5% ownership interests in Iron Castle with the remaining amounts vesting in parties to earlier agreements, together with a 5% profit share for all (*see* page 8 of the complaint). Although, the plaintiff allegedly agreed to this allocation, a change occurred which eliminated the plaintiff's receipt of the 17.5% ownership interests in Iron Castle and the 5% profit share from Iron Castle, and/or the 80% interest therein that Gulgard was originally expecting.

On August 28, 2012, defendant James J. Gardner allegedly formed defendant, EJS, Management, LLC as a Delaware limited liability company and transferred to it the 80% share in Iron Castle title of which was in Gardner's own name (*see* page 9 of the complaint). The court again notes that this action is inconsistent with the allegations that Chilean law prohibits foreign company ownership in companies such as Iron Castle. Thereafter, both Gardner defendants purportedly refused to vest in plaintiff Gulmi 50% of the 80% ownership interest Gulgard was allegedly entitled so as to mirror the 50% interest Gulmi had in Gulgard as allegedly agreed to by the plaintiff and defendant James J. Gardner (*see id* at page 8). The Gardner defendants are charged with further refusing to pay Gulmi the monies the Gardner defendants have received to date from Iron Castle.

The defendants' version of the facts differ in certain material ways. They claim to have met the Morelys in early 2012, as they were British investors interested in investing in Chilean mining ventures. In May of 2012, Gardner came to learn from the Morley that plaintiff Gulmi was the subject of certain criminal investigations in Chile and, that under Chilean law, no business in which plaintiff Gulmi had an interest could operate without the risk of an immediate seizure and/or work stoppages (*see* ¶ 13 of the defendants' answer). Gardner advised the plaintiff that neither Gulgard nor any new company could raise capital from investors due to these problems and that all joint attempts by the defendants and Gulmi to acquire mineral rights in Chile would fail (*see* ¶ 13 of the defendants' answer). According to the defendants, the plaintiff and Gardner decided to go their separate ways and agreed upon the cessation of Gulgard's operations and distributions of Gulgard's assets to newly formed companies separately owned by each of them, individually. According to the defendants, all of Gulgard's rights to the development and harvest of coal, including mining and distribution rights would be relinquished to existing and/or newly formed companies owned by Gulmi, while Gardner would have exclusive rights and ownership in all Gulgard's interests in Chilean iron mining and distributions rights including its interest in Iron Castle (*see* ¶ 15 of the defendants' answer). Evidence of Gulmi's agreement to these transactions is alleged to be apparent from a May 15, 2012 amendment to certain schedules filed in the bankruptcy proceeding.

The complaint served and filed herein contains seven causes of action. In the FIRST, the plaintiff seeks the following judicial declarations: a) that plaintiff Gulmi is entitled to 17.5% of the issued outstanding stock of Iron Castle and an order directing the defendants to transfer that shareholder interest to him; b) that Gulgard is entitled to all of the issued outstanding common stock of Iron Castle controlled by the any defendant including EJS and that they be ordered to transfer such shareholder interest to Gulgard and that Gulgard should be dissolved due to a deadlock in its voting shares and its assets

distributed in the form of common stock in Iron Castle in a percentage determined by the court; or c) that the defendants be directed to vote their shares of Iron Castle to recognize Gulmi as a director; and d) that the defendants be required to disgorge all profits and money received by, through and/or in relation to Iron Castle and/or 50% of such amounts directly to Gulmi. The SECOND and THIRD causes of action purport to be derivative in nature as Gulmi therein seeks, as 50% shareholder of Gulgard, his recovery of damages by reason of purported breaches of fiduciary duties owing by the Gardner defendants, respectively. In the FOURTH cause of action, plaintiff Gulmi seeks the recovery of damages from defendants, James J. Gardner and defendant EJS, LLC., by virtue of constructive fraud and/or breaches of fiduciary duties owing to Gulmi. By the FIFTH cause of action, plaintiff Gulmi seeks the imposition of a constructive trust upon the share of stock in Iron Castle controlled by any defendant that belongs to either plaintiff Gulmi or Gulgard. Advanced in the SIXTH cause of action is a claim for conversion of the subject shares of stock, while the SEVENTH cause of action contains demands for preliminary and permanent injunctive relief.

Issue was joined by service of a joint answer by all defendants which includes eight affirmative defenses and two, of which assert set-off and recoupment claims. Three of such affirmative defenses are premised upon the defense of standing or lack of capacity to sue on the part of plaintiff Gulmi and upon principles of estoppel. These defenses rest upon allegations that Gulmi failed to truthfully disclose the value of his stock interest in Gulgard in a Chapter 7 bankruptcy petition he filed in January of 2012. Therein, the plaintiff's 50% ownership interest in Gulgard was valued at zero. The defenses further rest upon allegations that the plaintiff failed to list the claims asserted in this action on schedules. These failures, coupled with his failure to amend the schedule calling for the disclosure of all claims any time prior to the July 20, 2012 close of the bankruptcy proceeding, leaves the plaintiff without standing or the capacity to prosecute such claims here, because all such claims are part of the bankruptcy estate, over which, the bankruptcy trustee has exclusive control.

By the instant motion(#001), the plaintiff seeks the following "temporary and permanent" injunctive relief: a mandatory injunction "requiring the defendants to take all action necessary to revest Gulgard, Inc., with all common stock of Minera Iron Castle Mining, S.C.M"(Iron Castle Mining); and 2) a prohibitive injunction "restraining the defendants from removing, selling, transferring, hypothecating, or in any other manner disposing of the common stock in Iron Castle Mining. The plaintiff further seeks summary judgment on those portions of his FIRST cause of action for declaratory relief declaring Gulgard's entitlement to the defendants' Iron Castle stock and directing them to disgorge all profits and money received by, through and/or in relation to Iron Castle and/or 50% of such amounts directly to Gulmi. The plaintiff also seeks summary judgment on his FIFTH cause of action for a constructive trust upon the defendants' stock interests in Iron Castle in favor of either Gulmi or Gulgard and on his SEVENTH cause of action for preliminary and permanent injunctive relief. In his moving papers, the plaintiff claims that the affirmative defense of lack of standing or lack of capacity to sue asserted in the answer of the defendants is no bar to the granting of the plaintiff's motion since Gulmi's 50% ownership interest in Gulgard was scheduled in his bankruptcy filings and any interest therein was abandoned by the trustee upon the close of the bankruptcy proceeding. By virtue of such abandonment, all rights of the trustee were terminated and Gulmi was allegedly reinvested with his ownership interests in such stock. Although the bankruptcy trustee has been contacted by the defendants' counsel, the absence of a final order reopening the proceeding allegedly leaves the plaintiff possessed of the requisite standing or capacity to prosecute the claims advanced herein.

The defendants oppose the plaintiff's motion upon certain of the grounds advanced as affirmative defenses, including the lack of standing and/or lack of capacity defense that is predicated upon the plaintiff's failure to truthfully disclose the value of his stock interest in Gulgard and his failure to list the claims herein in the bankruptcy filings any time prior to close of the bankruptcy proceeding by final decree in August of 2012. Moreover, a motion by the trustee to reopen the bankruptcy proceeding is pending before the bankruptcy court and the granting of such motion would operate as a revocation of the abandonment, if any, of the trustee's exclusive control over the claims that are the subject of this action. The defendants further oppose the motion on the ground that documentary evidence produced by them demonstrates that claims on which the plaintiff seeks summary judgment are legally insufficient because elemental facts material to such claims do not exit or are disproved by the documents relied upon by the defendants.

For the reasons stated below, the motion is denied and the court declines to issue any judicial declaration of the rights of the parties due to the absence of a justiciable controversy between such parties. An award of reverse summary judgment dismissing certain causes actions upon which the plaintiff moved is awarded to the defendants pursuant to CPLR 3212(b).

First considered are those portions of the plaintiff's motion wherein he seeks mandatory and prohibitive preliminary injunctive relief. The primary function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full determination of the merits (*see S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC.*, 81 AD3d 629, 916 NYS2d 789 [2d Dept 2011]; *Gluck v Hoary*, 55 AD3d 668, 865 NYS2d 356 [2d Dept 2008]; *Ruiz v Meloney*, 26 AD3d 485, 486, 810 NYS2d 216 [2d Dept 2006]). The standard used to determine a party's entitlement to preliminary injunctive relief rests upon the establishment of the following three elements: 1) a likelihood of success on the merits; 2) irreparable harm if the relief is not granted; and 3) that a balance of the equities tilts in its favor (*see Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]). Where mandatory injunctive relief is requested, that is, one requiring affirmative action on the part of the non-moving party that confers upon the movant some form of the ultimate relief sought, the traditional three prong test is enlarged to include a showing of "unusual" or extraordinary circumstances (*see Roberts v Paterson*, 84 AD3d 655, 923 NYS2d 326 [1st Dept 2011]; *Board of Mgrs. of Wharfside Condominium v Nehrlich*, 73 AD3d 822, 900 NYS2d 747 [2d Dept 2010]; *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255 [1st Dept 2009], *supra*; *SHS Baisley, LLC v Res Land, Inc.*, 18 AD2d 727, 728, 795 NYS2d 690 [2d Dept 2005]; *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 349, 765 NYS2d 573 [1st Dept 2003]).

Here, the plaintiff's motion for preliminary injunctive relief contains demands for both mandatory and prohibitive preliminary injunctive relief. Ordinarily, the court's analysis would begin with consideration of whether the plaintiff established a likelihood of success on the merits, irreparable harm if the relief is not granted and that a balance of the equities favor the plaintiff's position. However, the defendants' interposition of the lack of standing and/or capacity to sue defense, which constitutes a legal defense in bar, warrants consideration of that defense first.

In his moving papers, the plaintiff anticipated that the lack of standing and/or capacity to sue defense raised in the answer of the defendants would be asserted in opposition to this motion so to

defeat, in particular, the likelihood of a success element of his claim for preliminary injunctive relief. As indicated above, the plaintiff addressed the defense in his moving paper. He therein claims that there is no lack of standing or the capacity to prosecute the claims interposed herein because he scheduled his stock interest in Gulgard as property and the trustee abandoned such property upon the close of the proceeding that occurred upon issuance of the final decree entered therein in August of 2012. By virtue of that abandonment, all rights of the trustee were terminated and Gulmi was allegedly reinvested with his ownership interests in such stock and all rights in the stock ownership brings including the right to sue. The court, however, finds these claims to be without merit.

The object of a bankruptcy proceeding commenced under Chapter 7 of the Bankruptcy Code is to provide the debtor with a “fresh start” upon discharge by the liquidation of all non-exempt property in the bankruptcy estate for the benefit of creditors. Pursuant to 11 USC §541(a)(1), the bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case” including, contingent civil claims for damages possessed by the debtor (11 USC §541[a][1]). It also includes proceeds, product, off spring, rents, profits of or from property of the estate, except such that are earning from services performed by an individual debtor after the commencement of the case (*see* 11 USC §541[a][6]).

The estate is further defined as including “any interest in property that the estate acquires after the commencement of the case” (11 USC §541[a][7]). Referred to as a catchall provision, § 541(a)(7) embodies the principle of that estate, having a separate legal identity from the debtor, is an active entity comprised of not only property interests the debtor held at the commencement of the case, but of property the estate itself generates while operating under the aegis of the Bankruptcy Code (*see Wade v Bailey*, 287 B.R. 874, 880–881 [S.D. Miss.2001]). By its express terms, § 541(a)(7) only operates when property is encompassed within the estate in the first instance, after which time, any property generated by that estate property becomes, itself, included in the estate (*see In re Doemling*, 116 B.R. 48, 50 [Bankr. W.D.Pa.1991]). In sum “every conceivable interest of the debtor, future, non-possessory, contingent, speculative, and derivative, is within the reach of § 541” including contractual rights and “all causes of action owned by the debtor or arising from property of the estate” (*Chartschlaa v Nationwide Mut. Ins. Co.*, 538 F.3d 116 [CA.2 2008]; *Seward v Devine*, 888 F.2d 957, 963 [2d Cir.1989]).

Once an asset is deemed to belong to the bankruptcy estate, the asset may no longer be controlled by the debtor (*see Matter of Educators Group Health Trust*, 25 F.3d 1281, 1284 [C.A. 5 1994]). It is thus clear that a bankruptcy trustee appointed in a Chapter 7 proceeding has the exclusive authority to prosecute a cause of action accruing to the debtor that belongs to the estate (*see Matter of Educators Group Health Trust*, 25 F.3d 128, *supra*; *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1153–54 [C.A. 5 1987]; *Long Is. Forum for Tech. v New York State*, 85 AD3d 791, 925 NYS2d 535 [2d Dept 2011]). It is equally clear that a debtor is required to schedule such causes of action as assets on the bankruptcy petition so that the trustee can determine whether the claims should be abandoned or administered by the bankruptcy court for the benefit of the creditors (*see Dynamics Corp. of Am. v Marine Midland Bank–New York*, 69 NY2d 191, 195–196, 513 NYS2d 91 [1987]; *Tri-State Sol-Aire Corp. v Martin Assoc., Inc.*, 7 AD3d 514, 776 NYS2d 99 [2d Dept 2004]; *Mehlenbacher v Swartout*, 289 AD2d 651, 734 NYS2d 290 [3d Dept 2001]). Property can be “abandoned” only where the trustee or the debtor-in-possession knows of it and manifests an intent to abandon it, inasmuch as revesting depends upon the fact that it has been consciously rejected or relinquished as part of the estate

(*Dynamics Corp. of Am. v Marine Midland Bank—New York*, 69 NY2d 191, 197, *supra*). If an estate cause of action is not listed in the schedule of assets, it cannot be deemed to have been abandoned by the trustee (*see* 11 USC § 554), and such cause of action remains the property of the estate (*see* 11 USC § 554[d]; *First Natl. Bank of Jacksboro v Lasater*, 196 U.S. 115, 25 S.Ct. 206 [1905]).

“[I]t is well settled that pre-petition causes of action are assets included within the meaning of property of the estate” (*Hopkins v Foothill Mtn., Inc.*, 346 B.R. 294, 303 [Bankr. E.D.N.Y. 2006]; There is federal authority for the proposition that Chapter 7 post-petition claims and causes of action will become property of the estate if they are sufficiently rooted in the pre-bankruptcy past (*see In re Jackson*, 593 F.3d 171 [C.A. 2 2010]). Claims resting on pre-petition conduct constitute property of the estate irrespective of whether the debtor was aware of such claims or formally asserted them (*see Thomas v. JP Morgan Chase, N.A.*, 2012 WL 2872164, [E.D.N.Y. 2012]). Federal courts have applied the doctrine of judicial estoppel against debtors who fail to truthfully disclose assets including claims in their bankruptcy filing, the effect of which, is to “to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy” (*see Ibok v SIAC-Sector Inc.*, 470 Fed.Appx. 27, 2012 WL 1701323 [C.A.2d N.Y. 2012]; *Neely v RMS Residential Mortg. Solution, L.L.C.*, 2013 WL 752636 [E.D.N.Y. 2013]).

State appellate case authorities have held that trustees possess the sole right to sue on all claims that were not disclosed during a bankruptcy proceeding, irrespective of whether they arose pre-petition or post-petition (*see Barranco v Cabrini Med. Ctr.*, 50 AD3d 281, 855 NYS2d 431 [1st Dept 2008]; *Williams v Stein*, 6 AD3d 197, 775 NYS2d 255 [1st Dept 2004]). Concomitantly, “the failure to schedule a legal claim as an asset in a bankruptcy proceeding deprives the debtor of standing to raise it in a subsequent legal action whether the claim asserted in the complaint arose prior to the filing of the bankruptcy petition or afterward, such claim is still the property of the bankrupt's estate pursuant to the Bankruptcy Code” (*DeLarco v DeWitt* 136 AD2d 406, 527 NYS2d 615 [3d Dept 1988]; *see Hansen v Madani*, 263 AD2d 881, 693 NYS2d 332 [3d Dept 1999]).

Here, the record is replete with uncontradicted documentary evidence that the plaintiff scheduled his stock interest in Gulgard as property belonging to him at the time of filing, although he valued it at zero dollars. The record likewise contains unrefuted documentary evidence that the plaintiff failed to schedule the claims interposed in this action in his bankruptcy proceeding following their accrual during the pendency of the bankruptcy proceeding. Even if the some claims accrued thereafter, there is ample evidence that the plaintiff had knowledge of the facts underlying his claims prior to the close of the proceeding and that all such claims are sufficiently rooted in Gulmi's pre-bankruptcy past that they constitute estate assets. These circumstances renders the plaintiff's claim of a trustee abandonment of control over the Gulgard stock that was an asset of the bankruptcy estate upon filing due to its inclusion as property owned by Gulmi and his claims as to the purported relinquishment of the trustee's right to sue with respect to it, unmeritorious under the above cited authorities.

In addition, the court finds that there was no abandonment by the trustee of Gulmi's scheduled ownership interest in Gulgard nor the right of the trustee to control same, including the right to sue upon claims arising during the pendency of the proceeding due to Gulmi's failure to truthfully disclose its value and the existence of the contingent and unliquidated claims that arose with respect thereto during the bankruptcy proceeding. The defendants thus established, as a matter of law, the merits of their

asserted defense that the plaintiff lacks standing or the capacity to prosecute the claims interposed in this action, at least with respect to the claims which were the subject of the plaintiff's motion.

Therefore, court denies those portions of the plaintiff's motion wherein he seeks preliminary injunctive relief in its entirety due to the plaintiff's lack of standing and/or lack of capacity to sue. Likewise denied are those portions of the plaintiff's motion wherein he seeks summary judgment on those portions of his FIRST cause of action for a judicial declaration of declaring Gulgard's entitlement to the defendants' Iron Castle stock and commanding them to disgorge all profits and money received by, through and/or in relation to Iron Castle and/or 50% of such amounts directly to Gulmi. Although the court is generally required to issue a declaration favorable to the defendants on these matters due to the denial of summary judgment to the plaintiff (*see Carey v Carey*, 101 AD3d 787, 957 NYS2d 140 [2d Dept 2012]; *National Grid Corp. Serv., LLC v LeSchack & Grodensky, P.C.*, 100 AD3d 721, 954 NYS2d 131[2d Dept 2012]), the court declines to do so here, as there is no justiciable controversy between the plaintiff and the defendants due to the plaintiff's lack of standing and/or capacity to sue (*see CPLR 3001; Downe v Rothman*, 215 AD2d 716, 627 NYS2d 424 [2d Dept 1995]; *A justiciable controversy is a real dispute between adverse parties, involving substantial legal interests, for which a declaration of rights will have some practical effect*).

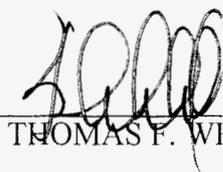
Also denied, in light of the plaintiff's lack of standing and/or capacity to sue, are the plaintiff's demands for summary judgment on those portions of the FIFTH cause of action for a constructive trust and on his SEVENTH cause of action for injunctive relief. The defendants' successful assertion of their lack of standing and/or capacity to sue defense is a complete bar to the plaintiff's prosecution of these claims and warrants their dismissal and the dismissal of those portions of the FIRST cause of action on which the plaintiff unsuccessfully moved for summary judgment.

The defendants are thus awarded, pursuant to CPLR 3212(b), reverse summary judgment dismissing those portions of the FIRST cause of action, subparagraph b thereof, wherein, the plaintiff demanded a judicial declaration of Gulgard's entitlement to the defendants' Iron Castle stock and directing them to disgorge all profits and money received by, through and/or in relation to Iron Castle and/or 50% of such amounts directly to Gulmi. The defendants are further awarded reverse summary judgment dismissing the plaintiff's FIFTH and SEVENTH causes of action pursuant to CPLR 3212(b). All such awards are made without prejudice to the rights of the bankruptcy trustee to reassert one or more of these claim in this action, upon his substitution and the granting of leave to amend the complaint. or in any other action he may commence.

The causes of action upon which reverse summary judgment have been awarded to the defendants are severed from those unaffected by such an award pursuant to CPLR 3211(e). Accordingly, the defendants *may*, should they be so advised, settle a judgment reflecting the severance herein directed and the award of reverse summary judgment dismissing the FIFTH and SEVENTH causes of action set forth in the complaint, without prejudice to the rights, if any, of the bankruptcy trustee to re-assert them as contemplated above.

Dated: _____

4/5/13



THOMAS F. WHELAN, J.S.C.