INDEX NO.:	650139-2014
PLAINTIFF:	FRERE-JONES, TOBIAS
DEFENDANT:	HOEFLER, JONATHAN
CASE STATUS:	Disposed
ACTION:	CD-ECONTRACT
LAST UPDATE:	03-24-2021 9:00pm
JUSTICE:	OING, JEFFREY K.

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NEW SEARCH

Documents that have been entered into the minutes of the County Clerk bear a stamp stating "Filed," followed by the date of filing (entry date) and the words "New York County Clerk's Office." Except in matrimonial cases (documents for which are not included in Scroll), judgments are not entered by the County Clerk until an attorney for a party to the case appears at the Judgment Clerk's desk (Rm. 141B at 60 Centre Street) and requests entry. Copies of unfiled judgments bearing a stamp stating "Unfiled Judgment" and a notice to counsel may be found in Scroll. For technical reasons, some long form orders or other documents that were scanned in the early phase of this project may be categorized here as a "Decision."

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER

Defendant.

Index No.

Date Index No. Purchased:

Plaintiff designates New York County as the place of trial.

The basis of venue is CPLR Article 5.

SUMMONS

To the above named Defendant:

Jonathan Hoefler
c/o Hoefler & Frere-Jones
611 Broadway
Room 725
New York, NY 10012-2608

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on Hoguet Newman Regal & Kenney, LLP, within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: January 16, 2014
New York, New York

HOGUET NEWMAN
REGAL & KENNEY, LLP

Fredric S. Newman

Fredric S. Newman
Kerin P. Lin

10 East 40th Street, 35th Floor
New York, New York 10016
Phone: 212-689-8808
Attorneys for Plaintiff
Tobias Frere-Jones

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER

Defendant.

Index No.

COMPLAINT

NATURE OF THIS CLAIM

1. This is an action to enforce an agreement made between Plaintiff Frere-Jones and Defendant Hoefler to become equal owners in The Hoefler Type Foundry, Inc. ("HTF"), presently known and operating as Hoefler & Frere-Jones. Their agreement was that Frere-Jones would contribute his name, reputation, industry connections and design authority, as well as certain fonts he had already developed and owned or would own when he left his former company (referred to as the "Dowry Fonts"), valued in excess of $3 million, in exchange for half of Hoefler's equity in HTF and "his name on the door." Frere-Jones fully performed all of his agreed obligations, and he moved to New York to do so.

2. However, in the most profound treachery and sustained exploitation of friendship, trust and confidence, Hoefler accepted all of the benefits provided by Frere-Jones while repeatedly promising Frere-Jones that he would give him the agreed equity, only to refuse to do so when finally demanded.

JURISDICTION AND VENUE

3. This Court has personal jurisdiction over the defendants pursuant to CPLR § 301 because both parties are residents of New York City and acts complained of occurred here, and venue is proper pursuant to CPLR Article 5.

THE PARTIES

4. Plaintiff Tobias Frere-Jones is one of the world's leading and most recognized type designers, having designed over 800 fonts, in over 145 languages, that are widely used in newspapers, magazines, advertising, packaging, websites, corporate identities, political campaigns and websites around the world. He joined the faculty of the Yale School of Art in 1996 and frequently lectures on typeface design and typography at other academic institutions and graphic design organizations throughout the world. His work has been profiled in many trade and general purpose publications, and is included in the permanent collection of the Victoria & Albert Museum, London and the Museum of Modern Art, New York. In 2006, Frere-Jones became the first American to receive the prestigious Gerrit Noordzij Prize, presented by the Royal Academy of Fine Arts in The Hague in honor of his unique contributions to type design, typography, and type education. In 2013, he received the AIGA medal —the graphic design profession's highest honor—in recognition for his exceptional achievements over the course of his career, and his contributions to the field of design and visual communication.

5. Defendant Jonathan Hoefler is also a type designer and a businessman.

RELEVANT FACTS

6. After publishing his first retail font at the age of nineteen and graduating from the Rhode Island School of Design, Plaintiff began working for The Font Bureau, Inc. ("Font Bureau") in Boston in 1992.

7. While at Font Bureau, Frere-Jones designed several well-received and profitable fonts that are Font Bureau's best known, including Interstate, Poynter Oldstyle and Poynter Gothic.

8. Fonts are software, and are purchased by way of license to use the licensed font software in specific ways, in print, online and other media.

9. During the 1990s, Hoefler owned and operated a one-man design shop, The Hoefler Type Foundry, Inc. ("HTF"), a New York corporation.

10. Frere-Jones and Hoefler got to know each other as competitors, then as collaborators, and by the mid-1990s, they were close friends.

11. In the summer of 1999, Hoefler approached Frere-Jones about working together "as Tobias and Jonathan's Excellent Adventure (LLC)" and Hoefler made a formal 50-50 partnership proposal at the Gotham Bar and Grill in Manhattan.

12. Hoefler's proposal was that Frere-Jones leave Font Bureau and move to New York City, and that they join together as equal partners in a new venture to be housed in HTF.

13. The heart of the proposal was that Frere-Jones would contribute his name, reputation, industry connections and design authority, as well as obtain and assign to HTF the rights to certain fonts he had already developed at Font Bureau

(referred to as the "Dowry Fonts") in exchange for half of the equity in Hoefler's existing business, HTF.

14. A critical part of the creation of the new partnership was that Frere-Jones would "have his name on the door."

15. The Dowry Fonts included the following font families: Whitney (a/k/a Whitney Sans), Whitney Titling, Elzevir (a/k/a MSL Elzevir), Welo Script, Archipelago (f/k/a Shell Sans), Type O, Saugerties, Greasemonkey, Vive, Apiana, and Esprit Clockface. Fonts from the Dowry became the basis for both lucrative commission work and one of HTF's most successful and profitable retail font families—Whitney—and HTF would not exist in its current form today without them. In proposing the partnership to Frere-Jones, Hoefler expressed that Whitney would be the most valuable of the Dowry Fonts to be assigned to HTF. Hoefler knew that Frere-Jones had already received one industry award for Whitney, in 1998, and he told Frere-Jones that the Whitney family would fill a very large gap in HTF's repertoire because there were no fonts in the then-existing HTF library that were as versatile or had such a wide range of potential applications.

16. In furtherance of the partnership agreement, in late 1999, Frere-Jones left Font Bureau, moved to New York and joined HTF as the principal designer responsible for the creation and manufacture of new font designs, the creation and refinement of new methodologies, technological troubleshooting and the training and management of future junior designers.

17. Hoefler's principal role was to run the business side of the company and use his "client-hustling skills" to sell Frere-Jones's work.

18. Frere-Jones never would have left Font Bureau and Boston, where he was established and had achieved significant renown, merely to work for HTF as an employee.

19. Without Frere-Jones, HTF was a one-man shop. With Frere-Jones, HTF grew dramatically in size—from Hoefler and an office assistant to as many as eighteen people—in scope and scale, and in recognition.

20. As early as February 2000, Hoefler began to promote his partnership with Frere-Jones to industry and media contacts, current clients and potential clients. For example, on February 22, 2000, Hoefler emailed Sephora Creative, a potential client: "I think when we last spoke, I was in the process of setting up my new partnership with Tobias Frere-Jones (you know his Interstate [font] family, among others)...."

21. Between 2000 and 2004, the two partners worked together to build HTF from Hoefler's solo shop into a significant business depending upon Frere-Jones's reputation, industry connections, design skills, training and management expertise with junior designers and the Dowry Fonts.

22. At the same time, Frere-Jones and Hoefler repeatedly discussed completing their basic deal, and they began to focus on rebranding HTF as "Hoefler & Frere-Jones," the name under which it operates today.

23. In June 2003, the partners and HTF Chief Operating Officer, Carleen Borsella (Hoefler's wife)—who had begun working for HTF in 2002 in a business and marketing role—hired a public relations consultant to implement the name change:

> "Jonathan Hoefler, Principal of The Hoefler Type Foundry, and Tobias Frere-Jones, Type Director of The Hoefler Type Foundry, announced today that they have entered into an agreement to become equal partners and to rename the business Hoefler & Frere-Jones Typography."

24. Significantly, between their agreement in 1999 and March 2004, the partners developed, expanded, and grew HTF without any corporate formality. This ratified Hoefler's and Frere-Jones's 50-50 partnership agreement.

25. Also during that period, Frere-Jones continued to perform his part of the 50-50 partnership agreement by negotiating with Font Bureau to obtain the rights to the Dowry Fonts, which he acquired in November 2002.

26. In January 2004, Hoefler and HTF's attorney Frank Martinez presented Frere-Jones with a Sale and Assignment of Type Fonts that transferred the Dowry Fonts to HTF. Frere-Jones signed this agreement in March 2004; he was not separately represented by counsel. The sale was for nominal consideration of $10 and Frere-Jones, who had left Font Bureau, moved to New York and actively worked to build HTF, all in reliance on the 50-50 partnership agreement, considered signing the document a ministerial act as part of his performance of the original bargain with Hoefler.

27. Upon information and belief, in March 2004, the royalty value of the Dowry Fonts was in excess of $3 million.

28. Frere-Jones never would have transferred the Dowry Fonts to HTF but for his 50-50 partnership agreement with Hoefler.

29. After he signed the Sale and Assignment of Type Fonts, Frere-Jones repeatedly asked Hoefler to complete his part of the bargain and transfer half of the ownership in HTF to him, and Hoefler repeatedly acknowledged his obligation to do so,

but each time begged off purportedly due to the pressures of work or his personal life. As a good partner, Frere-Jones respected Hoefler's wishes.

30. Upon information and belief, on the many occasions that Hoefler put off Frere-Jones, he intended to, and did, dupe Frere-Jones and the graphic design world into thinking that there was an equal partnership (as reflected by the trade name then being used and as repeatedly expressed both orally and in writing publicly and internally within HTF).

31. Hoefler's actions were intentional and perpetrated with the intent of obtaining the Dowry Fonts and Frere-Jones's name, reputational benefit, industry connections, and design work and authority for the exclusive benefit of Hoefler.

32. Meanwhile, Hoefler continued to represent that Frere-Jones was his business partner and to describe him as so, both internally and publically. For example, Hoefler had always represented to Frere-Jones that they drew the same salary and received the same percentage of contributions into their retirement accounts, and in an unrelated litigation, Hoefler valued the two men as equals.

33. In 2004, HTF printed its first catalogue under the name "Hoefler & Frere-Jones." In it, Hoefler wrote:

> Since we began working together in 1999, Tobias has developed some of the studio's most exciting projects, including original typefaces for Nike, Martha Stewart Living, Pentagram, and The Wall Street Journal. Working together has given us the chance to more fully explore our interests, and it's heightened both our sense of purpose and the standard to which we hold our combined body of work. So in celebration of our ongoing collaboration, I'm delighted to announce that The Hoefler Type Foundry will enter its sixteenth year as HOEFLER & FRERE-JONES.

34. Time passed, and Hoefler continued to represent Frere-Jones as his partner to industry contacts and clients, such as the Smithsonian Institute (2012), and reaped the benefits of doing so.

35. In the Spring of 2012, Hoefler told Frere-Jones that he would complete their deal as soon as HTF launched a new product, an online font delivery service geared towards web designers, called cloud.typography.com (the "Cloud").

36. The Cloud offers its subscribers the ability to access and purchase fonts from the HTF type library for use in web page design, including one of the Dowry Fonts and fonts designed or improved by Frere-Jones.

37. The Cloud launch date was continually postponed.

38. In the Spring of 2013, on multiple occasions, Frere-Jones asked Hoefler to see HTF's financial records but Hoefler refused.

39. The Cloud finally launched on July 1, 2013.

40. On the day the Cloud launched, Frere-Jones asked Hoefler to set a date to conclude their deal as Hoefler had promised, which Hoefler scheduled on July 31, 2013.

41. On July 31, 2013, Frere-Jones followed up with Hoefler, and Hoefler responded to Frere-Jones, "Stop it. I'm working on it. Stop harassing me."

42. On October 21, 2013, for the first time, Hoefler explicitly reneged on his personal agreement to transfer 50% of HTF to Frere-Jones.

43. Upon information and belief, Hoefler transferred to his wife, Borsella, the shares that he had promised to Frere-Jones and Hoefler and Borsella are now the owners of 100% of HTF.

FIRST CAUSE OF ACTION
(Breach of Contract)

44. Plaintiff repeats and realleges paragraphs 1 to 43 as if fully set forth herein.

45. Defendant Hoefler and Plaintiff Frere-Jones entered into an oral contract.

46. Hoefler promised to transfer to Frere-Jones 50% of his ownership of HTF in exchange for Frere-Jones's transfer of the Dowry Fonts and Frere-Jones's resignation from Font Bureau, relocation to New York, and contribution of his name, reputation, industry connections and design authority to HTF.

47. Frere-Jones completely performed his agreement by obtaining and transferring the Dowry Fonts, resigning from Font Bureau, relocating to New York, and giving his name, reputation, industry connections and design authority to HTF.

48. Hoefler has repeatedly refused to transfer the agreed consideration in blatant, willful and egregious breach of contract.

49. Frere-Jones has suffered damage from the breach in an amount to be determined at trial but not less than $20 million.

SECOND CAUSE OF ACTION
(Promissory Estoppel)

50. Plaintiff repeats and realleges paragraphs 1 to 49 as if fully set forth herein.

51. Defendant Hoefler promised to transfer to Plaintiff Frere-Jones 50% of his ownership of HTF in exchange for Frere-Jones's transfer of the Dowry Fonts and Frere-Jones's resignation from Font Bureau, relocation to New York, and contribution of his name, reputation, industry connections and design authority to HTF.

52. Hoefler represented to Frere-Jones and the public their equal partnership and repeatedly renewed his promise to transfer 50% of his ownership of HTF to Frere-Jones.

53. Frere-Jones acted in reasonable reliance on Hoefler's repeatedly expressed promise to transfer 50% ownership of HTF to him.

54. Frere-Jones repeatedly asked Hoefler to complete their deal and transfer half of the ownership of HTF to him, and Hoefler repeatedly acknowledged his obligation to do so but refused to do so.

55. As a result of Frere-Jones's reliance on the promise made by Defendant, Frere-Jones has suffered damage from his reliance in an amount to be determined at trial but not less than $20 million.

THIRD CAUSE OF ACTION
(DECLARATION OF CONSTRUCTIVE TRUST)

56. Plaintiff repeats and realleges paragraphs 1 to 55 as if fully set forth herein.

57. Defendant Hoefler entered into an oral partnership agreement with Plaintiff Frere-Jones.

58. As Frere-Jones's partner, Hoefler owed Frere-Jones a fiduciary duty.

59. Hoefler promised to transfer to Frere-Jones 50% of the ownership of HTF in exchange for Frere-Jones's transfer of the Dowry Fonts, Frere-Jones's resignation from Font Bureau, relocation to New York, and contribution of his name, reputation, industry connections and design authority to HTF, and Frere-Jones acted in reasonable reliance upon Hoefler's express and repeated promises as well as Hoefler's actions taken publically to reinforce the promises.

60. Hoefler has repeatedly refused to transfer 50% of the ownership of HTF as he promised Frere-Jones.

61. As 100% owner of HTF (together with his wife), Hoefler has been unjustly enriched by half of the value of HTF derived from Frere-Jones's performance of their agreement.

62. By reason of the foregoing, Frere-Jones is entitled to a declaration that Hoefler hold a 50% share of HTF in trust for the benefit of Frere-Jones.

FOURTH CAUSE OF ACTION
(UNJUST ENRICHMENT)

63. Plaintiff repeats and realleges paragraphs 1 to 62 as if fully set forth herein.

64. Defendant Hoefler has been unjustly enriched and benefited by obtaining and retaining the Dowry Fonts, Plaintiff Frere-Jones's resignation from Font Bureau and relocation to New York, and Frere-Jones's name, reputation, industry connections and design authority without providing the agreed upon consideration.

65. Hoefler's unjust enrichment has come at the direct expense of Frere-Jones.

66. Allowing Hoefler to retain such enrichment is against equity and good conscience.

67. As a result of Hoefler's being unjustly enriched at the expense of Frere-Jones, Frere-Jones has been damaged in an amount to be determined at trial, but not less than $20 million.

FIFTH CAUSE OF ACTION
(FRAUD)

68. Plaintiff repeats and realleges paragraphs 1 to 67 as if fully set forth herein.

69. Defendant Hoefler falsely promised to transfer to Plaintiff Frere-Jones 50% of his ownership of HTF in exchange for Frere-Jones's transfer of the Dowry Fonts, Frere-Jones's resignation from Font Bureau, relocation to New York, and contribution of his name, reputation, industry connections and design authority to HTF.

70. Hoefler represented to Frere-Jones and the public that they were equal partners and repeatedly renewed his false promise to transfer half of his ownership of HTF to Frere-Jones.

71. At all relevant times, Hoefler knew that he was making false representations and promises to Frere-Jones.

72. Upon information and belief, on the many occasions that Hoefler made false representations and promises to Frere-Jones, he intended to, and did, dupe Frere-Jones into thinking that there was an equal partnership in order to induce Frere-Jones to transfer the Dowry Fonts and cause Frere-Jones to resign from Font Bureau, relocate to New York, and contribute his name, reputation, industry connections and design authority to HTF.

73. Frere-Jones was justified in relying on Hoefler's representations and promises.

74. Frere-Jones has suffered damage from Hoefler's fraud in an amount to be determined at trial but not less than $20 million.

WHEREFORE, the Plaintiff demands judgment against the Defendant as follows:

(a) On the First Cause of Action against the Defendant, damages in an amount to be determined at trial, but not less than $20 million;

(b) On the Second Cause of Action against the Defendant, damages in an amount to be determined at trial, but not less than $20 million;

(c) On the Third Cause of Action against Defendant, imposing a constructive Trust on 50% of the ownership of HTF currently held by Hoefler and/or his wife;

(d) On the Fourth Cause of Action against Defendant, damages in an amount to be determined at trial, but not less than $20 million;

(e) On the Fifth Cause of Action against Defendant, damages in an amount to be determined at trial, but not less than $20 million;

(f) On all causes of action, punitive damages in an amount to be determined at trial;

(g) Such further relief as the Court deems just and proper.

Dated: New York, New York
January 16, 2014

HOGUET NEWMAN REGAL & KENNEY, LLP

By: Fredric S. Newman

Fredric S. Newman
Kerin P. Lin

10 East 40th Street
New York, New York 10016
Tel.: 212-689-8808
Fax: 212-689-5101

Attorneys for Plaintiff Tobias Frere-Jones

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

----------X

TOBIAS FRERE-JONES

PLAINTIFF,

V.

Index No.: 650139/2014

JONATHAN HOEFLER

Affidavit of Service

DEFENDANT.

----------X

STATE OF NEW YORK)
.ss.:
COUNTY OF NEW YORK)

Dean DiGregorio, being duly sworn, deposes and says:

I am over eighteen years of age and I am not a party to this action. I am a duly licensed process server by the Department of Consumer Affairs, License # 1266217.

That on the 16th day of January 2014, at 1:50 pm, I personally served a copy of the Notice of Commencement of Action Subject to Mandatory Electronic Filing, Summons and Complaint upon Jonathan Hoefler at 611 Broadway, New York, New York 10012.

Jonathan Hoefler is described as follows: A male with white skin, brown hair, between the age of 30-45 years, weighing approximately 151 to 200 pounds and approximately 5'6 to 6'0" in height.

Process Server/Date 1/16/14

Sworn to before me this
16th day of January 2014

Notary Public

ROBERT FINKELSTEIN
Notary Public, State of New York
ID No. 02FI6177456
Qualified in New York County
Commission Expires November 13, 2015

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

TOBIAS FRERE-JONES, Plaintiff, -against- JONATHAN HOEFLER, Defendant.	Index No. 650139/2014 **STIPULATION**

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, by their undersigned counsel, that Defendant's time to respond to the Complaint in this action shall be extended to February 21, 2014.

This Stipulation may be executed electronically and/or in counterparts, and a copy bearing original and/or electronic signatures shall be treated and deemed for all purposes as an original hereof.

Dated: New York, New York
February 3, 2014

HOGAN LOVELLS US LLP

By: _____
Michael DeLarco
David Baron
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Attorneys for Defendant

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By: _____
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Telephone: (212) 689-8808
Attorneys for Plaintiff

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

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER,

Defendant.

Index No. 650139/2014

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, by their undersigned counsel, that Defendant's time to respond to the Complaint in this action shall be extended to March 7, 2014.

This Stipulation may be executed electronically and/or in counterparts, and a copy bearing original and/or electronic signatures shall be treated and deemed for all purposes as an original hereof.

Dated: New York, New York
February 20, 2014

HOGAN LOVELLS US LLP

By: _____
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875 Third Avenue
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Attorneys for Plaintiff

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

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER,

Defendant.

Index No. 650139/2014

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, by their undersigned counsel, as follows:

1. Defendant will file and serve Plaintiff with a motion to dismiss no later than March 14, 2014.

2. Plaintiff's answering papers shall be served on Defendant by April 4, 2014.

3. Defendant's reply papers shall be served on Plaintiff no later than April 18, 2014.

4. The motion to dismiss shall be returnable on April 21, 2014.

5. This Stipulation may be executed electronically and/or in counterparts, and a copy bearing original and/or electronic signatures shall be treated and deemed for all purposes as an original hereof.

Dated: New York, New York
March 5, 2014

HOGAN LOVELLS US LLP

By: _____
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER,

Defendant.

Index No. 650139/2014

NOTICE OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

PLEASE TAKE NOTICE that upon the attached Affirmation of Michael DeLarco, Esq., sworn to on the 6th of March, 2014, with annexed exhibits and the accompanying Memorandum of Law, Defendant Jonathan Hoefler, by his attorneys Hogan Lovells US LLP, will move this Court at 9:30 a.m. on April 21, 2014, or as soon thereafter as counsel can be heard, at the New York County Courthouse, 60 Centre Street, New York, NY 10007, Motion Support Office, Room 130, Pursuant to Sections 3211(a)(1), (5), and (7) of the New York Civil Practice Law and Rules ("CPLR"), for an order dismissing with prejudice all claims asserted against him in the Complaint filed in the above-captioned action and granting such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to the Stipulation between the Parties dated March 5, 2014, you are hereby required to serve copies of your answering affidavits and supporting papers on the undersigned no later than April 4, 2014, and Defendant will serve his reply papers no later than April 18, 2014.

Dated: New York, New York
March 6, 2014

HOGAN LOVELLS US LLP

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

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER,

Defendant.

Index No. 650139/2014

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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Defendant Jonathan Hoefler ("Hoefler" or "Defendant") respectfully submits this memorandum of law, together with the two pieces of documentary evidence annexed to the Affirmation of Michael DeLarco, Esq. ("DeLarco Aff."), in support of Hoefler's Motion to Dismiss the Complaint of plaintiff Tobias Frere-Jones ("Frere-Jones" or "Plaintiff")[1] in its entirety and with prejudice pursuant to N.Y. C.P.L.R. §§ 3211(a)(1), (5) and (7).

PRELIMINARY STATEMENT

This lawsuit is a transparent attempt by Frere-Jones to wrest undeserved equity from a successful designer and businessman that has gainfully employed and generously compensated him for the past 14 years. Hoefler categorically denies Plaintiff's allegations—including the very existence of the alleged 1999 "oral agreement" on which they are based—but the law requires the allegations of a Complaint to be presumed as true for the purposes of a Motion to Dismiss. Even making that presumption, the Complaint must still be dismissed as a matter of law.

First, *all* of the causes of action—whether in contract, quasi-contract, or tort—are clearly time-barred. Frere-Jones alleges that in 1999—15 years before he filed this action—Hoefler made him an oral "partnership proposal" whereby in exchange for Frere-Jones's contribution of his name and reputation as a font designer, his time, and certain specified typefaces, Hoefler would cede Frere-Jones half of the equity in Hoefler's business, the Hoefler Type Foundry, Inc. ("HTF"). The Complaint further alleges that by March 2004—almost ten years before he filed this action—Frere-Jones had fully performed his side of the bargain, but Hoefler failed to give Frere-Jones any equity despite Frere-Jones's repeated requests. Indeed, on March 9, 2004—the date Frere-Jones alleges he met his end of the alleged bargain—Hoefler and Frere-Jones

[1] The Complaint is annexed to the DeLarco Aff. as Exhibit C.

simultaneously executed two written agreements (DeLarco Aff. Exs. A & B) to govern the parties' relationship, but these agreements make no mention of—and are in fact inconsistent with—Frere-Jones's demand for equity in HTF. Thus, Frere-Jones's claims as a matter of law accrued *at the latest* in March 2004, and Hoefler is entitled to relief under CPLR §§ 3211(a)(1) and (5) because even the longest of the statutes of limitations for the actions alleged (six years) expired, at the latest, by March 2010.

Frere-Jones's only excuse for not enforcing the alleged promise in those six years is that Hoefler allegedly put him off with repeated oral acknowledgements of his obligation to give Frere-Jones equity. This fails as a matter of law under N.Y. General Obligations Law § 17-101, which requires Frere-Jones to produce a *written* acknowledgement of an alleged prior promise in order to take his claims out of the statute of limitations. Frere-Jones does not and cannot allege that such a writing exists (and, in fact, the March 9, 2004 writings belie his claims). Frere-Jones therefore cannot avoid dismissal of his Complaint on statute of limitations grounds.

In addition to being time-barred, each of Plaintiff's causes of actions are fatally defective. The parties' two simultaneously-executed contracts from 2004 not only commenced the running of the statute of limitations, but they also bar—under the parol evidence rule—Plaintiff's allegations of an inconsistent, prior oral agreement regarding equity in HTF made five years earlier in 1999. The oral contract claim also fails on its own for lack of definite terms. Plaintiff's quasi-contract causes of action for promissory estoppel, unjust enrichment, and imposition of a constructive trust fail because they, too, are precluded by the 2004 written contracts, which govern the exact same subject matter on which these claims are based. Finally, Plaintiff's cause of action for fraud fails as a matter of law because Plaintiff cannot, as he

attempts, recast a breach of promise as fraud simply by alleging that Hoefler never intended to perform the alleged promise in the first place.

In sum, Frere-Jones's claims are based on the absurd premise that although he negotiated two written agreements with Hoefler in 2004 regarding their relationship, the parties somehow failed to include a provision regarding Frere-Jones's right to equity, which Frere-Jones now values at $20 million. This theory is both time-barred and untenable as a matter of law, and this Court must therefore grant Hoefler's Motion to Dismiss the Complaint in its entirety and with prejudice.

RELEVANT FACTS

Presuming the allegations in the Complaint as true (again, solely for the purposes of this Motion), the relevant facts are as follows:

In 1989, Hoefler founded a typeface design company—HTF—that he has owned and operated ever since. (Compl. ¶ 9.) Plaintiff alleges that in the summer of 1999, Hoefler offered Plaintiff half of his company by making a "50-50 partnership proposal" at the Gotham Bar and Grill in Manhattan. (*Id.* ¶ 11.) Plaintiff alleges that the "heart" of this 1999 "proposal" was for Plaintiff to leave his then-existing employment at The Font Bureau, Inc. ("Font Bureau"), move to New York City, "contribute his name, reputation, industry connections and design authority" to HTF, obtain ownership from Font Bureau of certain fonts he had developed there (labeled in the Complaint as the "Dowry Fonts"), and then assign the Dowry Fonts to HTF. (*Id.* ¶¶ 1, 12–13.) In return, Hoefler would purportedly give Plaintiff "half of the equity" in HTF and put Plaintiff's "name on the door." (*Id.* ¶¶ 13–14.). Plaintiff attributes no specific oral statements to Defendant or provides any other details of the alleged oral contract.

Plaintiff claims that he acted "in furtherance of the partnership agreement" in late 1999 by leaving Font Bureau, moving to New York, and joining HTF as a typeface designer. (*Id.*

¶ 16.) Plaintiff alleges that he also "perform[ed]" on the alleged "partnership agreement by negotiating with Font Bureau to obtain the rights to the Dowry Fonts, which he acquired in November 2002." (*Id.* ¶ 25.) During this same period of time, Plaintiff alleges that he and Hoefler worked together and "repeatedly discussed completing their basic deal." (*Id.* ¶¶ 21–22.) Again, Plaintiff does not allege any specifics regarding this "basic deal," such as whether a new entity would be formed or if Plaintiff was to be admitted as a shareholder to HTF and, if so, under what terms as to capital contributions, assets and liabilities, profits and loss, and disputes and separation.

In January 2004—five years after the alleged oral "partnership proposal" and almost two years after HTF itself began working on the Dowry Fonts—Plaintiff alleges that he was presented with a Sale and Assignment of Type Fonts (the "Assignment Agreement") to formally transfer the Dowry Fonts to HTF. (*Id.* ¶ 26.) On March 9, 2004, two months after being presented with the Assignment Agreement and with ample time to review, Plaintiff executed the Assignment Agreement. (*Id.*; *see also* DeLarco Aff. Ex. A.[2]) Though Plaintiff alleges that he considered signing the Assignment Agreement "a ministerial act as part of his performance of the original bargain," the writing speaks for itself and makes no mention of partnership or equity in HTF as consideration for the Dowry Fonts. (DeLarco Aff. Ex. A.) To the contrary, the

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[2] By repeatedly referring to and relying on the Assignment Agreement, Plaintiff has incorporated it into his Complaint by reference, and the Court may therefore consider it for the purposes of this Motion. *See Deer Consumer Prods., Inc. v. Little*, No. 650823-2011, 32 Misc.3d 1243(A), at *4 (Sup. Ct. N.Y. Cnty. Aug. 31, 2011) ("[I]t is undisputed that the Court, on a CPLR 3211(1) or (7) dismissal motion, may consider documents referred to in a Complaint . . . even if the pleading fails to attach them."); *Lore v. N.Y. Racing Ass'n, Inc.*, No. 007686-04, 12 Misc.3d 1159(A), at *2 (Sup. Ct. Nassau Cty. May 23, 2006) ("In assessing the legal sufficiency of a claim, the Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference."); *Evans v. Strawn*, No. 604798-01, 2002 WL 34357986 (Sup. Ct. N.Y. Cty. July 8, 2002) (accepting facts from documents incorporated by reference in complaint on motion to dismiss).

Assignment Agreement clearly states that Plaintiff and Hoefler executed it as "independent entities" and that it "*is not intended to be, nor shall be construed as a joint venture, partnership, or other form of business organization*." (*Id.* ¶ 11 (emphasis added).) The Assignment Agreement also specifies that it "constitutes the entire understanding between the Parties and supersedes all previous agreements, promises, representations and negotiations between the Parties concerning the [Dowry] Fonts." (*Id.* ¶ 12.)

On the same day that Plaintiff executed the Assignment Agreement, Plaintiff also entered into an "Employment Agreement" with HTF whereby HTF and Hoefler would "employ [Plaintiff] as Principal and Director of Typography." (DeLarco Aff. Ex. B., ¶ 1.1.[3]) Significantly, part of Plaintiff's consideration for the Employment Agreement—his duties—were precisely those that he now alleges in the Complaint as consideration for his "partnership agreement" some five year earlier. Such duties include: (i) the "design and development of . . . retail type font products;" (ii) "the direction and supervision of the development of typefaces;" and (iii) "the management and supervision of the efforts of [others] who may be involved in the design and development of type fonts." (*Id.* ¶¶ 1.2, 1.4; *compare with* Compl. ¶ 16 ("In furtherance of the partnership agreement . . . [Plaintiff] joined HTF as the principal designer responsible for the creation and manufacture of new font designs, the creation and refinement of

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[3] Although Plaintiff does not reference the Employment Agreement in the Complaint, the Court should consider the Employment Agreement for the purposes of this motion pursuant to N.Y. C.P.L.R. § 3211(a)(1) because it conclusively establishes several defenses to the asserted claims as a matter of law. *See*, *e.g.*, *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 (1st Dep't 2004); *Zutty v. Rye Select Broad Mkt. Prime Fund, L.P.*, No. 113209-2009, 33 Misc.3d 1226(A), *4 (Sup. Ct. N.Y. Cnty. Apr. 15, 2011), *aff'd* 303 A.D.331 (1st Dep't 2003). In particular, and as set forth fully herein, the Employment Agreement, along with the Assignment Agreement (which *is* incorporated into the Complaint and which Plaintiff signed the same day), (i) conclusively establish the 2004 date by which, at the latest, the statutes of limitations on Plaintiff's claims began to run, and (ii) preclude as a matter of law Plaintiff's contract and quasi-contract causes of action.

new methodologies, . . . and the training and management of future junior designers.").) The Employment Agreement also required Plaintiff, as further consideration, to assign to HTF all fonts "which, prior to the execution of [the Employment] Agreement, the Company has assisted in developing, used, offered for sale or otherwise promoted." (DeLarco Ex. B ¶ 12.) This included the Dowry Fonts, which by Plaintiff's own admission he and Hoefler worked on together between 2000 and 2004, prior to entering into the Assignment Agreement and the Employment Agreement on March 9, 2004. (Compl. ¶ 21.)

The Employment Agreement contains additional terms that show Plaintiff was an employee and not an owner of or partner in HTF. Specifically, the Employment Agreement provides that Plaintiff "shall not be required, nor have . . . authority to enter into agreements on behalf of the Company or otherwise have the power to bind the [C]ompany or any principal of the Company to any obligation." (DeLarco Aff. Ex. B ¶ 1.2.) It also provides for Plaintiff's salary,[4] bonus structure, insurance and retirement benefits, reimbursable business expenses, vacation, and the furnishing of working facilities—all staples of an employment relationship, not a partnership. (*Id.* ¶¶ 6–9.) The Employment Agreement additionally states that all work done by Plaintiff in connection with HTF's business or products "shall be the sole and exclusive property of [HTF]"—nothing is enumerated as the property of Plaintiff as a purported "partner." (*Id.* ¶ 12.) Finally, as consideration for Hoefler and HTF entering into the Employment Agreement and providing Plaintiff with certain employment benefits, Plaintiff agreed to the use of his "name and likeness in the identification of the Company"—a term that Plaintiff alleges was "critical" to the alleged partnership agreement. (*Id.*; *see also* Compl. ¶ 14.)

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[4] For confidentiality reasons, Hoefler has redacted Plaintiff's salary, which increased dramatically during Plaintiff's employment.

Plaintiff alleges that after he executed the Assignment Agreement (and necessarily the Employment Agreement, which he simultaneously executed), he "repeatedly asked" Hoefler to transfer half of the ownership in HTF to Plaintiff. (Compl. ¶ 29.) Plaintiff vaguely claims that Hoefler "repeatedly acknowledged his obligation to do so," but each time refused to enact the transfer. (*Id.*) Plaintiff does not allege a single writing in which Hoefler supposedly acknowledged his purported obligation.

In the Spring of 2012—eight years after executing the Assignment Agreement and Employment Agreement and eight years after Hoefler allegedly breached his alleged promise to transfer half of HTF to Plaintiff—Hoefler purportedly told Plaintiff that he would "complete their deal as soon as HTF launched a new product" known as Cloud.typography (the "Cloud"). (*Id.* ¶ 35.) The Cloud was launched on July 1, 2013, and Hoefler allegedly rebuked Plaintiff's attempt to "conclude their deal" on that date and again on July 31, 2013. (*Id.* ¶¶ 39–41.) Approximately three months later, on October 21, 2013, Plaintiff contends that Hoefler "for the first time . . . explicitly reneged on his personal agreement to transfer 50% of HTF to [Plaintiff]." (*Id.* ¶ 43.) The Complaint does not specify how Hoefler so "reneged" at this time or how this instance was any different from the "repeated" occasions from 2004 forward when Hoefler allegedly refused to transfer half of HTF to Plaintiff. (*Id.* ¶¶ 29, 43.)

ARGUMENT

I. PLAINTIFF'S CLAIMS MUST BE DISMISSED AS THEY ARE BARRED BY APPLICABLE STATUTES OF LIMITATIONS

All five causes of action alleged in the Complaint are time barred. Below, Hoefler discusses the accrual and statutory limitations periods for each; however, there can be no doubt that *all* causes of action accrued *no later than* March 2004. By this point, Plaintiff had been providing font design and development services to HTF for more than four years, Hoefler had

changed the name of the business to include Plaintiff's name, and Plaintiff had assigned the Dowry Fonts to Hoefler/HTF under the Assignment Agreement—*but* Frere-Jones did not receive the allegedly promised equity in return. The simultaneously-executed Employment Agreement—tellingly avoided by Frere-Jones in the Complaint but clearly competent under CPLR § 3211(a)(1) to support a statute of limitations defense—also placed Frere-Jones "on notice" that he was being treated as an employee and not as an owner of HTF after he allegedly completed his end of the bargain. *See*, *e.g.*, *Morgenthow & Latham v. Bank of N.Y. Co.*, 305 A.D.2d 74, 78 (1st Dep't 2003) (dismissing fraud claim based on documentary evidence showing that plaintiff was put on notice of alleged misrepresentations two years prior to date alleged in the complaint); *Lessoff v. 26 Court St. Assocs., LLC*, 58 A.D.3d 610, 610–11 (2d Dep't 2009) (dismissing complaint as untimely based on documentary evidence showing that plaintiff's claim accrued earlier than plaintiff alleged); *Bluefin Wear, Inc. v. Tuesday's Child Boutique, Inc.*, No. 13766-2010, 33 Misc.3d 1233(A), at *3 (Sup. Ct. Kings Cnty. Dec. 14, 2011) (dismissing breach of contract claim as untimely based on documentary evidence showing the date of the alleged breach).

The longest statutory limitations period available with respect to Plaintiff's claims is six years. Thus, the entire Complaint was time-barred—at the very latest—as of March 2010. And, since Plaintiff has no writing supporting his case, General Obligations Law 17-101 precludes him from arguing that Hoefler's alleged "repeated assurances" after 2004 created a new or continuing contract for statute of limitations purposes. The action should therefore be dismissed in its entirety and with prejudice.

A. Plaintiff's breach of contract claim (First Cause of Action) is time-barred.

To bring a breach of contract claim in New York, a plaintiff must file a complaint within six years from the date the alleged contract was breached. N.Y. C.P.L.R. § 213(2); *Ely-*

Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 (1993). The statute of limitations begins to run at the time of the alleged breach and regardless of when the breach was discovered or when damages were incurred. *Id.*; *Ruyniak v. Gensini*, 629 F. Supp. 2d 203, 233 (N.D.N.Y. 2013); *Oechsner v. Connell Ltd. P'ship*, 283 F. Supp. 2d 926, 936 (S.D.N.Y. 2003), *aff'd* 101 F. App'x 849 (2d Cir. 2004) (dismissing breach of contract and promissory estoppel claims as untimely where statute of limitations began to run when the alleged promise was first breached despite plaintiffs' claim that they did not have actual knowledge of breach until defendant's admission fourteen years later); *Huang v. Slam Commercial Bank Pub. Co.*, 247 F. App'x 299, 301 & n.2 (2d Cir. 2007) (promissory estoppel and breach of contract claims accrued the first time plaintiff failed to receive the consideration she expected for her performance).

In this case, even assuming *arguendo* that there was an "oral partnership agreement" between Plaintiff and Hoefler,[5] the alleged agreement was breached at the very latest in March of 2004. Plaintiff asserts that by March 2004, he had "completely performed" on the "partnership agreement" but Hoefler failed to complete his part of the agreement by transferring half of HTF to the Plaintiff despite Plaintiff's repeated demands that he do so. (Compl. ¶ 47; *see also id.* ¶¶ 16–17, 24–25, 29–30.) Thus, Plaintiff was required under the CPLR to bring his action by March 2010, six years after the alleged breach occurred. *E.g.*, *Ely-Cruikshank*, 81 N.Y.2d 399 at 402–04. Plaintiff did not file his Complaint until January 2014—almost ten years after Hoefler allegedly failed to perform on his promise. Thus, his First Cause of Action for breach of contract is untimely and should be dismissed.

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[5] As set forth *infra* at Part II.A., Plaintiff cannot and does not allege such an enforceable agreement.

B. Plaintiff's promissory estoppel claim (Second Cause of Action) is time-barred.

Under New York law, the statute of limitations for a promissory estoppel claim is, like a breach of contract claim, six years. *Schmidt v. McKay*, 555 F.2d 30, 36 (2d Cir. 1977). The essence of promissory estoppel is a claim of damages for a breach of promise, and the statute of limitations runs from the date of the alleged breach. *Id.*

Plaintiff's promissory estoppel claim is time-barred for the same reasons his breach of contract claim is time-barred. Hoefler allegedly orally promised Plaintiff half of HTF during a meeting at a restaurant in 1999. (Compl. ¶¶ 11–14.) By March 2004, though Plaintiff had allegedly fully "relied" to his detriment on the alleged oral agreement by leaving his former employer and transferring the Dowry Fonts to HTF, Hoefler did not transfer half of HTF to Plaintiff. (*Id.* ¶¶ 16–17, 24–25, 29–30, 47, 54.) Plaintiff's promissory estoppel claim therefore accrued at the latest as of March 2004. *See Huang*, 247 F. App'x 299 at 301 & n.2; *Oechsner*, 283 F. Supp. 2d at 936.

C. Plaintiff's constructive trust claim (Third Cause of Action) is time-barred.

A cause of action which seeks to impose a constructive trust remedy is governed by a three- or six-year statute of limitations that begins to accrue "upon the occurrence of the wrongful act giving rise to a duty of restitution." *Aufferman v. Distl*, 56 A.D.3d 502 (2d Dep't 2008) (internal quotations omitted).[6] Where, as here, Plaintiff alleges that Hoefler wrongly

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[6] A declaration of constructive trust is actually a remedy and not a cause of action. *See*, *e.g.*, *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 419 (S.D.N.Y. 2010) (citing *Bertoni v. Catucci*, 117 A.D.2d 892, 895 (3d Dep't 1986)). To the extent Plaintiff has alleged a cause of action seeking constructive trust as a remedy, it appears that Plaintiff has alleged a breach of fiduciary duty. (See Compl. ¶ 58.) Claims for breach of fiduciary duty are subject to a three-year (not six-year) statute of limitations, which runs from the date of the alleged breach. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009). Notwithstanding, the distinction between three and six years in this case is one without a difference, as the alleged

withheld property, the statute of limitations runs from the date that Hoefler allegedly breached the agreement to transfer the property. *Id.* It is irrelevant when the facts constituting the alleged wrongful withholding are discovered. *Id.*

Plaintiff's demand for a constructive trust is time-barred for the same reasons as his other claims: the alleged breach underlying the demand occurred at the absolute latest in March 2004 when (i) Plaintiff executed his Assignment Agreement and Employment Agreement, and (ii) Hoefler first refused to transfer half of HTF to Plaintiff despite the fact that Plaintiff had allegedly fully performed on the alleged "partnership agreement." *Cf. Jakacic v. Jakacic*, 279 A.D.2d 551, 552–53 (2d Dep't 2001) (wrongful conduct to start statute of limitations on demand for a constructive trust in real property "would have occurred when the plaintiff asked to have the [property] transferred [ ] to him and the defendant refused"). Ten years have passed since the alleged breach, and the statute of limitations on Plaintiff's demand for a constructive trust has long since run.

D. Plaintiff's unjust enrichment claim (Fourth Cause of Action) is time-barred.

There is no identified statute of limitations for unjust enrichment claims under New York law. *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dep't 2013). However, where, as here, an unjust enrichment claim is based upon the same facts as a breach of contract claim, a six-year statute of limitations applies. *Id.* The statute of limitations runs from the time of the wrongful act allegedly giving rise to a duty of restitution. *Aufferman*, 56 A.D.3d at 502; *Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp.*, 192 A.D.2d 501, 503 (2d Dep't 1993).

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wrong occurred at the latest in 2004, which is far outside of any conceivable statute of limitations, whether three or six years.

Therefore, Plaintiff's unjust enrichment claim—like his other claims—is untimely. Plaintiff needed to file his unjust enrichment claim at least by March 2010, six years after the date of the alleged breach. *See*, *e.g.*, *Sirico v. F.G.G. Prods, Inc.*, 71 A.D.3d 429, 434 (1st Dep't 2010) (dismissing unjust enrichment claim for royalties from music recordings on statute of limitations grounds because the claim accrued at the time the recordings were made); *Congregation Yetev Lev D'Satmar*, 192 A.D.2d at 503 (dismissing unjust enrichment claim on statute of limitations grounds because the claim accrued at the time of the first alleged unlawful transfer of property despite subsequent transfers also claimed to be unlawful). Accordingly, Plaintiff's unjust enrichment claim is time-barred.

E. Plaintiff's fraud claim (Fifth Cause of Action) is time-barred.

The statute of limitations for fraud claims is six years from the date of the fraud or two years from the time Plaintiff could with reasonable diligence have discovered the fraud. N.Y. C.P.L.R. § 213(8).[7] The test as to when a fraud should have been discovered with reasonable diligence is an objective one. *Gutkin v. Siegal*, 85 A.D.3d 687, 688 (1st Dep't 2011). "Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for an investigation, knowledge of the fraud will be imputed to him." *Id.* (internal quotation omitted).

In *Gutkin*, the First Department upheld a motion to dismiss the plaintiff's claim that the defendants committed fraud by failing to disclose that the plaintiff would receive a smaller return

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[7] If the six-year statute of limitations applied, the fraud claim would have been untimely in the summer of 2005, which is six-years after Hoefler allegedly misrepresented to Plaintiff in 1999 that he would give Plaintiff half of his Company. Assuming *arguendo* that Plaintiff is entitled to a limitations period measured from two years from the date he discovered or with reasonable diligence could have discovered the alleged fraud, his claim is still untimely.

on an investment than he anticipated. *Id.* at 687. The plaintiff in *Gutkin* realized that his investment returns were less than expected, but when he asked the defendants why, he was given a "cursory explanation." *Id.* at 687–88. According to the court, the plaintiff in *Gutkin* had constructive knowledge of the alleged fraud when he realized that his returns were lower than expected, and that "[a]t that point, a reasonable investor . . . would have investigated further, rather than accept the cursory explanation plaintiff allegedly received." *Id.*

Similarly, in *Parrish v. Unidisc Music, Inc.*, the First Department upheld a motion to dismiss a fraud claim based on an alleged breach of a recording agreement. 68 A.D.3d 566 (1st Dep't 2009). The plaintiff in *Parrish* initially entered into an agreement with the defendants' predecessor in 1982 for royalties on the sale of the plaintiff's recordings. *Id.* at 567. In 1998, the plaintiff asked the defendants about his entitlement to royalties, and the defendants informed the plaintiff that he was no longer entitled to royalties pursuant to a termination agreement the plaintiff had signed. *Id.* In 2004, the plaintiff filed a fraud claim alleging that his signature on the termination agreement was a forgery. *Id.* However, the Court dismissed the plaintiff's claim because he was put on notice of the alleged fraud when the defendants claimed a right to plaintiff's work in 1998, and therefore had only two years from that point to state an action for fraud. *Id.*

Gutkin and *Parrish* are analogous to the facts alleged by Plaintiff in the Complaint. Here, Frere-Jones allegedly expected a transfer of half of HTF following an oral "proposal" made by Hoefler in 1999. (Compl. ¶ 11.) Frere-Jones never received the alleged transfer, entered into two written agreements five years later that did not mention (and were in fact inconsistent with) any such transfer, and when Plaintiff subsequently asked Hoefler to make the transfer, Hoefler "each time begged off" with a cursory explanation about the pressures of his work and personal

life. (*Id.* ¶¶ 26, 29.) In the face of these facts, any reasonable person in Frere-Jones's position would have been on notice as of March 2004 that Hoefler did not intend to provide him with any equity in HTF. *See Gutkin*, 85 A.D.3d at 687–88; *Parrish*, 68 A.D.3d at 567; *Oechsner*, 283 F. Supp. 2d at 936 (dismissing fraud claim on statute of limitations grounds because claim accrued from the time plaintiffs could have learned of alleged misrepresentation, despite having received written confirmation of same 14 years later). Any fraud claim Plaintiff may have had therefore expired in March 2006 (two years later) and is now untimely. N.Y. C.P.L.R. § 213(8).

F. The applicable statutes of limitations have not been tolled or renewed.

Hoefler anticipates that Frere-Jones may attempt to argue that the applicable statutes of limitations have been tolled or renewed because Hoefler allegedly "repeatedly acknowledged his obligation" to "transfer half of the ownership in HTF to [Plaintiff]" for almost ten years until October 21, 2013, when Hoefler allegedly "reneged" on the agreement "for the first time." (Compl. ¶¶ 29, 43.) However, under New York General Obligations Law § 17-101, the statute of limitations for an alleged oral agreement is not tolled or renewed by a defendant's purported acknowledgment of the oral agreement unless the acknowledgment is "contained in a writing signed by the party to be charged." *Chi Kee Pang v. Synlyco, Ltd.*, 89 A.D.3d 976, 977 (2d Dep't 2011) (quoting statute). Indeed, such a writing "is *the only competent evidence* of a . . . continuing contract whereby to take an action out of the operation of the provision of limitations of time for commencing actions under the [C.P.L.R.]." *Id.* (emphasis in original). This writing requirement applies to all of Plaintiff's claims. *See Burrowes v. Combs*, 25 A.D.3d 370, 371 (1st Dep't 2006) (alleged promises not in writing were insufficient to toll statute of limitations on plaintiff's fraud, unjust enrichment, and constructive trust claims). Plaintiff does not—and cannot—allege that such a writing exists. Accordingly, all of Plaintiff's claims expired, at the latest, in March 2010.

II. IN ADDITION TO BEING TIME-BARRED, PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION

In addition to being untimely, each cause of action in Plaintiff's Complaint fails to state a cause of action under CPLR § 3211(a)(7).

The alleged oral contract in 1999 fails first under the parol evidence rule because it purports to add to or vary the express and unambiguous 2004 Assignment and Employment Agreements and second because, standing alone, it does not contain any of the essential components of a valid partnership agreement under New York law.

Plaintiff's Second through Fourth Causes of Action—for promissory estoppel, declaration of constructive trust (under a theory of breach of fiduciary duty), and unjust enrichment, respectively—are similarly precluded by the 2004 Assignment and Employment Agreements because Plaintiff cannot recover in quasi contract where, as here, Plaintiff has not only one, but two valid and enforceable written contracts with Hoefler as to the subject matter of his claims.

Finally, Plaintiff's fraud claim fails because the conclusory allegation that Hoefler did not intend to perform at the time he entered into the alleged 1999 oral agreement is insufficient to take the cause of action out of contract law.

A. The 1999 Oral Contract Claim Is Precluded By The Parol Evidence Rule And Fails To Allege The Essential Components Of A Valid And Enforceable Partnership Agreement

The Complaint alternates between describing the alleged oral contract in 1999 as, on the one hand, making the parties "equal partners in a new venture" (Compl. ¶ 12) or a "partnership agreement" (*Id.* ¶ 19) and, on the other, a promise to "transfer half the ownership in HTF" (*Id.* ¶ 29). In either case, Plaintiff's First Cause of Action for breach of contract is precluded by the 2004 Assignment and Employment Agreements under the parol evidence rule. Further, to the

extent Plaintiff seeks to enforce the alleged 1999 oral proposal as a "partnership agreement," it is unenforceable for lack of definite terms.

1. *The alleged 1999 oral contract is barred by the parol evidence rule.*

As a matter of law, the 2004 Assignment and Employment Agreements preclude Plaintiff from alleging parol evidence of an oral partnership proposal allegedly made five years prior to such writings. *See Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 A.D.3d 614, 615–16 (1st Dep't 2009); *SAA-A, Inc. v. Morgan Stanley Dean Witter & Co.*, 281 A.D.2d 201, 203 (1st Dep't 2001) ("[t]he parol evidence rule bars admission of antecedent . . . oral representations to vary or add to the terms of a written agreement"); *N.Y. Fruit Auction Corp. v. City of N.Y.*, 81 A.D.2d 159, 165 (1st Dep't 1981), *aff'd* 56 N.Y.2d 1015 (1982) ("Where parties have reduced their agreement to writing, the parol evidence rule operates to exclude evidence of any prior oral or written agreement, or of any contemporaneous oral agreement when offered to contradict, vary, add to or subtract from the terms of the writing."). Here, the parol evidence rule precludes Plaintiff's oral contract claim because Hoefler accepted and acknowledged Plaintiff's contributions but offered employment and other consideration—but not partnership, equity, or ownership in HTF—in exchange.

According to the Assignment Agreement: (i) the Dowry Fonts had been transferred for ten dollars and HTF's agreement to ensure that Plaintiff received design credit; (ii) Plaintiff and Hoefler executed the Agreement as "independent entities;" (iii) the Agreement "is not intended to be, nor shall be construed as a joint venture, partnership, or other form of business organization;" and (iv) the Agreement "constitutes the entire understanding between the Parties and supersedes all previous agreements, promises, representations and negotiations between the Parties concerning the [Dowry] Fonts." (DeLarco Aff. Ex. A ¶¶ 1, 5, 11, 12.) Similarly, Plaintiff contributed his name, reputation, and font design services pursuant to the Employment

Agreement and not, as he alleges, pursuant to any oral agreement. (Compl. ¶¶ 16, 47.) Indeed, the Employment Agreement states unequivocally that Plaintiff would "design and develop [ ] . . . retail type font products" and contribute "his name and likeness in the identification of the Company" as consideration for his employment with HTF. (DeLarco Aff. Ex. B ¶¶ 1, 12.)

Dismissal is warranted because it is indisputable that the Assignment and Employment Agreements obligated Plaintiff to do exactly what he alleges he did pursuant to the alleged 1999 oral agreement. *See SAA-A, Inc.*, 281 A.D.2d at 203 (written contract terms for plaintiff's services precluded plaintiff from arguing that his performance was actually induced by reliance on an oral promise of additional consideration not cited in writing). It is simply impermissible under the parol evidence rule for Plaintiff now to allege that he had an oral understanding in 1999 for partnership or half the equity in HTF (which the Complaint's *ad damnum* alleges to be worth "not less than $20 million") in the face of two unambiguous, integrated, and simultaneously-executed written agreements. *See Johnson v. Stanfield Capital Partners, LLC*, 68 A.D.3d 628, 629 (1st Dep't 2009) (parol evidence rule bars employee's claim on an oral promise for compensation not set forth in a written employment agreement because "the parties would be expected to make reference to such a large sum of money in the written agreement with particularity" (quoting *Namad v. Salomon Inc.*, 74 N.Y.2d 751, 753 (1989))); *Stone v. Schulz*, 231 A.D.2d 707 (2d Dep't 1996) (parol evidence rule prevented enforcement of alleged oral agreement pursuant to which plaintiff claimed he was owed additional compensation beyond that specified in subsequent written agreement); *N.Y. Fruit Auction Corp.*, 81 A.D.2d 159 at 166) (barring parol evidence alleged to modify writing where matter was "of such controlling importance [that it] would normally have been incorporated in the [written contract]"); *Smith v. Felissimo Universal*, No. 151491-2012, 2013 WL 6735767, *3 (Sup. Ct. N.Y. Cnty. July 30,

2013) ("payment of a significant severance like the one plaintiff alleges she was promised is of the type that one would expect to be contained in the written employment agreement, yet the agreement is silent with respect to plaintiff's entitlement to such a payment"). In short, the idea that the parties failed to add a multi-million dollar provision to the written Assignment and Employment Agreements at the time they were executed is beyond farfetched; it renders Plaintiff's oral contract claim invalid as a matter of law.

2. *The alleged 1999 oral contract fails for lack of definite terms because Plaintiff does not allege any of the essential components of a valid and enforceable partnership agreement under New York law.*

To the extent Plaintiff alleges the breach of an oral "partnership agreement," this claim also fails because Plaintiff does not allege facts sufficient to constitute a valid and enforceable partnership agreement. Under New York law, the party "pleading the existence of a partnership has the burden of proving its existence." *Cent. Nat'l Bank, Canajoharie v. Purdy,* 249 A.D.2d 825, 826 (3d Dep't 1998). A plaintiff cannot survive a motion to dismiss unless he has pled the required elements of a partnership. *N. Am. Knitting Mills, Inc. v. Int'l Women's Apparel, Inc.*, No. 99 Civ. 4643(LAP), 2000 WL 1290608, *1 (S.D.N.Y. Sept. 12, 2000). Such elements are: (i) the sharing of profits and losses of the enterprise; (ii) the joint control and management of the business; (iii) the contribution by each party of property, financial resources, effort skill or knowledge; and (iv) an intention of the parties to be partners. *Id.* (citing cases). "[T]he essence of a partnership or joint venture is a community of interest that manifests in mutual control and an agreement to share the burden of losses." *Needel v. Flaum*, 248 A.D.2d 957, 958 (4th Dep't 1998) (citing cases).

Here, the Complaint is devoid of any allegation that Plaintiff agreed to share in the burden of losses, to jointly control management of the business, or to contribute any financial resources whatsoever. (*See* Compl.) To the contrary, Plaintiff baldly asserts that Hoefler simply

promised to transfer 50% of his company without any discussions as to how the transfer would be made, how assets would be divided, how the "partners" would allocate profit or loss, how the business would be managed, or what would happen in the event of a dispute or separation. Accordingly, Plaintiff's alleged partnership agreement is unenforceable and his breach of contract claim must be dismissed. *See*, *e.g.*, *Cent. Nat'l Bank*, 249 A.D.2d at 826; *N. Am. Knitting Mills*, 2000 WL 1290608, at *1; *Needel*, 248 A.D.2d at 958; *Rosenshein v. Rose*, No. 602869-2006, 20 Misc.3d 1115(A), *4 (Sup. Ct. N.Y. Cnty. July 7, 2008) (dismissing complaint on summary judgment where plaintiff could not show the existence of the "indispensable elements of a partnership").

B. Plaintiff's Quasi-Contract Causes Of Action For Promissory Estoppel, Declaration Of Constructive Trust, And Unjust Enrichment All Fail As A Matter Of Law

Plaintiff's Second, Third and Fourth Causes of Action in quasi-contract for promissory estoppel, constructive trust, and unjust enrichment also fail in light of the Assignment and Employment Agreements. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987) (citations omitted). Indeed, "[a] 'quasi contract' only applies in the absence of an express agreement" as "a legal obligation imposed in order to prevent a party's unjust enrichment." *Id.* (citing cases). It is in fact "impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Id.* at 389 (citing *Soviero Bros. Contr. Corp. v. City of N.Y.*, 286 A.D.435 (1st Dep't 1955), *aff'd* 2 N.Y.2d 924 (1957)). As the First Department "has consistently and succinctly stated the maxim, where there is an express contract no recovery can be had on a theory of implied contract."

Unisys Corp. v. Hercules, Inc., 224 A.D.2d 365, 370 (1st Dep't 1996) (internal quotations omitted); *SAA-A, Inc.*, 281 A.D.2d at 203 ("Without some manner removing the express contract from the picture in the normal fashion (rescission, abandonment, etc.) it is not possible to ignore it and proceed in quantum meruit." (citation omitted)).

Promissory estoppel, unjust enrichment, and constructive trust claims all sound in quasi-contract. *See Goldman v. Met. Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005) ("The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement. Here . . . there was no unjust enrichment because the matter is controlled by contract.") (internal citation omitted); *Bader v. Wells Fargo Home Mortg. Inc.*, 773 F. Supp. 2d 397, 415 (S.D.N.Y. 2011) ("Because it is a quasi-contractual claim, . . . promissory estoppel generally applies only in the absence of a valid and enforceable contract." (citing and quoting cases)); *Susman v. Commerzbank Capital Mkts. Corp.*, 95 A.D.3d 589, 590 (1st Dep't 2012) (dismissing promissory estoppel claim because "such a claim cannot stand when there is a contract between the parties"); *Equity Corp. v. Groves*, 294 N.Y. 8, 13 (1945) ("A constructive trust . . . is analogous to a 'quasi contractual obligation'[.]"); *In re First Cent. Fin. Corp.*, 377 F.3d 209, 214 (2d Cir. 2004) ("[T]he distinction under New York law between quasi-contractual remedies and constructive trust remedies has disappeared. . . . Accordingly, the principles that apply to quasi-contractual remedies also apply to constructive trusts.").

Here, the subject matter alleged by Plaintiff—including his provision of services, the contribution of his name, and his assignment of fonts to HTF—is fully governed by the Assignment and Employment Agreements. (DeLarco Aff. Exs. A, B.) Those agreements are bare of any mention of transferring half of HTF to Frere-Jones in consideration for his contributions. Like his oral contract claim, Plaintiff's quasi-contract causes of action improperly

"seek[] to add to the express, enforceable and unambiguous terms" of the Assignment and Employment Agreements. *Unisys*, 224 A.D.2d at 369. Simply put, the documentary evidence of express contracts precludes the Complaint's allegations of promissory estoppel, unjust enrichment and constructive trust arising out of the same subject matter. *See Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (1999) (although "the facts pleaded in the complaint must be taken as true and are accorded every favorable inference . . . [,] factual claims flatly contradicted by documentary evidence are not entitled to any such consideration"). *See also Adams v. O'Connor*, 245 A.D.2d 537 (2d Dep't 1997) (trial court "properly considered the evidentiary submissions to assess the viability of the complaint" which "demonstrated that a material fact alleged by the plaintiffs to be true was not a fact at all and that no significant dispute existed regarding it" (citations and internal quotations omitted)); *Bd. of Managers of 255 Hudson Condo. v. Hudson St. Assocs., LLC*, No. 101578-2012, 37 Misc.3d 1223(A), at *2 (Sup. Ct. N.Y. Cnty. Oct. 22, 2012) ("Documentary evidence that contradicts the allegations [in a complaint] are a basis for dismissal."). Plaintiff is therefore precluded from recovery under his quasi-contractual theories of promissory estoppel, unjust enrichment, and constructive trust, and these claims should be dismissed. *See*, *e.g.*, *Clark-Fitzpatrick*, 70 N.Y.2d at 388; *Unisys Corp.*, 224 A.D.2d at 370; *SAA-A, Inc.*, 281 A.D.2d at 203; *Goldman*, 5 N.Y.3d at 572; *Susman*, 95 A.D.3d at 590.

C. Plaintiff Fails To State A Cause Of Action For Fraud Because His Claim Is Duplicative Of His Contract Claim

"[T]he mere allegation that defendant . . . did not intend to honor his contractual obligations does not convert what was essentially a breach of contract action into an action for fraud." *Fallon v. McKeon*, 230 A.D.2d 629, 629–30 (1st Dep't 1996). *See also Tannehill v. Paul Stuart, Inc.*, 226 A.D.2d 117, 118 (1st Dep't 1996) (dismissing fraud claim because "the wrongful *act* alleged in support of the fraud claim does not differ from the purely contract-

related allegation that defendant did not intend to perform at the time it entered into the agreement, and therefore fails to state a cause of action") (emphasis in original); *Sangro Mgmt. Corp. v. Clinton Hills Apts. Owners Corp.*, 21 A.D.3d 545, 546 (2d Dep't 2005) ("General allegations that a defendant entered into a contract while lacking the intent to perform it are insufficient to support a fraud claim." (citations and quotations omitted)); *Brown v. Brown*, 12 A.D.3d 176, 176–77 (1st Dep't 2004) ("a simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract—i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself—has been violated"); *Int'l CableTel, Inc. v. Le Groupe Videotron Ltee*, 978 F. Supp. 483, 486–87 (S.D.N.Y. 1997) ("It is well settled under New York law that a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations" and "where a party is merely seeking to enforce its bargain, a tort claim will not lie." (internal quotations and citations omitted)).

Here, Plaintiff has simply attempted to disguise his breach of contract claim as a fraud claim; both claims are exclusively and expressly based on Hoefler's alleged promise to transfer half of his company to Plaintiff. (*See* Compl. ¶¶ 46, 69.) As the First Department has "observed on numerous occasions, restating a cause of action for breach of contract in various guises does not enhance the pleading." *McMahan & Co. v. Bass*, 250 A.D.2d 460, 462 (1st Dep't 1998) (citing *Stendig v. Thom Rock Realty Co.*, 163 A.D.2d 46, 47 (1st Dep't 1990); *Megaris Furs, Inc. v. Gimbel Bros., Inc.*, 172 A.D.2d 209, 211 (1st Dep't 1991)). Accordingly, Plaintiff's fraud claim must be dismissed.

CONCLUSION

For the foregoing reasons, Hoefler respectfully submits that the Complaint should be dismissed in its entirety and with prejudice.

Dated: New York, New York
March 6, 2014

HOGAN LOVELLS US LLP

By: /s/ Michael E. DeLarco_____
Michael DeLarco
David Baron
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Attorneys for Defendant Jonathan Hoefler

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

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER,

Defendant.

Index No. 650139/2014

AFFIRMATION OF MICHAEL E. DELARCO

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

MICHAEL E. DELARCO, an attorney admitted to practice in the State of New York, affirms under penalty of perjury that the following is true and correct:

1. I am a partner at the firm Hogan Lovells US LLP, counsel for Defendant Jonathan Hoefler ("Hoefler"), and I am admitted to practice in the State of New York. I submit this affirmation in support of Defendant's Motion to Dismiss the Complaint in this action. I have personal knowledge of the facts stated herein.

2. On or about January 16, 2014, Plaintiff filed the instant action alleging breach of contract, promissory estoppel, declaration of constructive trust, unjust enrichment, and fraud against Hoefler.

3. This action should be dismissed in its entirety based on documentary evidence, because it is barred by the applicable statutes of limitations, and because Plaintiff fails to state a cause of action against Hoefler.

4. Attached hereto as Exhibit A is a true and correct copy of the Sale and Assignment of Type Fonts Agreement entered into between Plaintiff and The Hoefler Type Foundry, Inc. dated March 9, 2004.

5. Attached hereto as Exhibit B is a true and correct copy of the Employment Agreement entered into between Plaintiff and The Hoefler Type Foundry, Inc. dated March 9, 2004.

6. Attached hereto as Exhibit C is a true and correct copy of the Complaint filed in this action.

7. No prior application for the relief herein requested has been made.

Dated: New York, New York
March 6, 2014

HOGAN LOVELLS US LLP

By: /s/ Michael E. DeLarco
Michael E. DeLarco
David Baron
875 Third Avenue
New York, NY 10022
(212) 918-3000
Attorneys for Defendant Jonathan Hoefler

SALE AND ASSIGNMENT OF TYPE FONTS

THIS AGREEMENT entered into between The Hoefler Type Foundry, Inc. ("HTF" or "Company"), having an office at 611 Broadway, Suite 608, New York, New York 10012-2608 and Tobias Frere-Jones ("TFJ") residing at 194 Bleecker Street, Apt 3-A, New York, New York 10012 (individually a "Party" together, the "Parties").

WHEREAS, HTF desires to purchase the designs and software associated with the type fonts identified below;

WHEREAS, TFJ desires to sell, assign and otherwise transfer all right and title in and to the designs and software associated with the type fonts identified below;

NOW THEREFORE, in view of the above-referenced recitals, for other good and valuable consideration, the tender, receipt and sufficiency of which is hereby acknowledged and in accordance with the terms and conditions noted herein, the Parties do hereby agree as follows.

1. Assignment of Rights. Tobias Frere-Jones, for the sum of ten dollars ($10), does hereby sell, assign and transfer all right and title in and to the type fonts known as ELZEVIR (a/k/a MSL ELZEVIR), WELO SCRIPT, ARCHIPELAGO (f/k/a SHELL SANS), WHITNEY (a/k/a WHITNEY SANS), WHITNEY TITLING, TYPE O, SAUGERTIES, GREASEMONKEY, VIVE, APIANA (font data only) and ESPRIT CLOCKFACE ("Fonts") together with the goodwill of the business symbolized thereby to The Hoefler Type Foundry, Inc., copies of which are annexed hereto as Exhibit A.

2. Ratification. HTF hereby assumes and ratifies all third-party agreements, licenses and obligations related to the prior use and licensing of the above-identified Fonts. Frere-Jones hereby agrees not to challenge, oppose or otherwise interfere with HTF's right to use, register, transfer or otherwise exploit the rights transferred herein. TFJ further agrees not to use or attempt to register any copyright or trademark associated with any the above-identified Fonts. TFJ agrees to cooperate and execute any necessary documents that may be required to facilitate the transfer and/or recordation of the rights identified herein.

3. Confidentiality. The Parties expressly agree that the terms and conditions of this Agreement, any third-party agreements or licenses and/or settlements relating to the prior use and licensing, if any, of the Fonts shall remain confidential. It shall not be considered a breach of this Agreement for either party to identify TFJ as the designer of the Fonts, the design history or the current ownership of the Fonts. This Agreement shall be worldwide in effect.

4. Prior Licenses. The Parties expressly acknowledge that TFJ may have previously licensed the Fonts to third parties on exclusive or other basis in the past. In order to avoid confusion, the Parties hereby agree to confer as to whether such a license is in effect prior to the issuance of a notice of infringement or other form of demand related to the third party use of any of the Fonts. Except as may be otherwise expressly provided for herein, nothing in this Agreement shall be construed as restricting HTF from collecting fees due or from otherwise asserting or exercising its rights in and to the Fonts. A copy of each of the former licenses is annexed hereto as Exhibit B. The Parties further acknowledge that TFJ has, in the past, designed, sold, assigned all right and title and/or licensed other type fonts in the past to other parties and that the assignment of the Font entitled APIANA is limited to the software for the Font and that the name and trademark APIANA are not assigned or otherwise transferred herein. Nothing herein, shall be construed as construed as restricting HTF from collecting fees due or from otherwise asserting or exercising its rights in and to any type fonts not expressly assigned under this Agreement.

5. Design Credit. HTF hereby agrees to use its commercially best efforts to ensure that TFJ shall receive a Design credit whenever the Fonts are displayed, including, but not limited to, their appearance in catalogs, specimen books, web sites, advertisements, marketing materials, competitions, awards, exhibitions, presentations, articles books and portfolios. Nothing herein shall be interpreted as obligating HTF to require or enforce the display of a TFJ design credit by any client, licensee or end-user of the Fonts.

6. Representations and Warranties. TFJ hereby represents and warrants that the fonts as well as the designs and software comprising the Fonts are original and do not knowingly infringe the rights of any third party. TFJ further represents and warrants that all third party licenses, rights or other entitlement in and to the Fonts or to use the Fonts has been disclosed herein.

7. Revocation of Warranties. Except as may be otherwise expressly represented or warranted herein above, each Party expressly disclaims all representations, warranties whether express or implied, including, but not limited to, the implied warranties of merchantability, title, non-infringement, agency and fitness for a particular purpose and without limiting the foregoing, neither party makes any express or implied representations or warranties with respect to the past or future performance of the Fonts. UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE TO THE OTHER OR ANY THIRD-PARTY, WHETHER IN CONTRACT OR TORT (INCLUDING NEGLIGENCE OR AGENCY) OR OTHERWISE, FOR ANY SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES, INCLUDING LOST PROFITS, SAVINGS OR BUSINESS INTERRUPTION AS A RESULT OF THE PAST AND/OR THE FUTURE PERFORMANCE AND/OR USE OF THE FONTS EVEN IF NOTIFIED IN ADVANCE OF SUCH POSSIBILITY. Excepted as is otherwise represented or warranted herein, the Parties further agree that under no circumstances shall a Party's liability to the other, exceed one dollar ($1.00).

8. Governing Law. This Agreement shall be interpreted, governed and enforced in accordance with the laws of the State of New York without giving effect to its conflict of laws principles or the conflict of laws principles of another state. The parties expressly consent to the jurisdiction of the state and federal courts of the State of New York over all disputes or actions arising out of this Agreement.

9. Severability. If any provision of this Agreement is declared by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions of this Agreement shall continue in full force and effect, and the invalid provision shall be replaced with a valid and enforceable provision that most closely effects the intent of the invalid provision.

10. Waiver. No waiver by either Party, whether express or implied, of any provision of this Agreement shall constitute a continuing waiver of such provision or a waiver of any other provision of this Agreement. No waiver by either Party, whether express or implied, of any breach or default by the other Party, shall constitute a waiver of any other breach or default of the same or any other provision of this Agreement.

11. Relationship of the Parties. The Parties to this Agreement are independent entities. This Agreement is not intended to be, nor shall it be construed as a joint venture, partnership, or other form of business organization.

12. Entire Agreement. This Agreement constitutes the entire understanding between the Parties and supersedes all previous agreements, promises, representations and negotiations between the Parties concerning the Fonts.

Signatures on Next Page

IN WITNESS WHEREOF, intending to be legally bound, the Parties hereto have signed this Agreement as of the day and year noted below.

THE HOEFLER TYPE FOUNDRY, INC.

By: _____
Jonathan Hoefler, President

Date: 9th March 2004

TOBIAS FRERE-JONES

By: _____
Tobias Frere-Jones

Date: 3/9/2004

REDACTED

EMPLOYMENT AGREEMENT

THIS AGREEMENT entered into between The Hoefler Type Foundry, Inc ("HTF" or "Company"), having an office at 611 Broadway, Suite 608, New York, New York 10012-2608 and Tobias Frere-Jones ("TFJ") residing at 194 Bleecker Street, Apt 3-A, New York, New York 10012 (individually a "Party" together, the "Parties").

The Parties to this Agreement do hereby agree as follows:

1. Employment and Responsibilities

1.1. The Company hereby offers to employ TFJ as Principal and Director of Typography of the Company and upon the terms and conditions set forth below, TFJ hereby accepts such employment.

1.2. TFJ shall have the title of Principal and Director of Typography and share responsibility for the design and development of various portions of the Company's retail type font products and the development and execution of custom type products and such other duties as are customary for a principal of a company having such titles. TFJ shall submit matters not within the ordinary course of the Company's business to an officer of the Company and, unless otherwise agreed upon, shall not be required, nor have the responsibilities of negotiating with clients, authority to enter into agreements on behalf of the Company or otherwise have the power to bind the company or any principal of the Company to any obligation.

1.3. TFJ shall perform additional duties that shall include, but may not be limited to, the direction and supervision of the development of typefaces for retail release, the direction and supervision of custom type projects and the management and supervision of the efforts of employees, independent contractors and free-lancers who may be involved in the design and development of type fonts. In addition, TFJ shall perform such other duties as the Officers of the Company may from time to time reasonably require of TFJ.

1.4. TFJ will execute all his responsibilities to the best of his ability, following generally accepted management principles, project schedules, applicable laws and regulations, the rules, policies, and by-laws of the Company.

2. Performance

2.1. TFJ shall devote his full time and best efforts to performing the duties of Principal and Director of Typography. It is hereby agreed upon between the parties that TFJ shall be considered a manager and "exempt employee" for the purposes of overtime compensation.

2.2. Nothing herein shall preclude TFJ from pursuing other business, charitable or investment activities provided that such business or investment activities are unrelated to typography or the sale, marketing, design or development of type fonts and further provided that no other outside activity detracts or infringes upon the time TFJ has agreed to devote to the performance of the obligations set forth in this Agreement. It is understood by the Parties that TFJ shall be entitled to reasonably engage in speaking and teaching activities and whenever possible, TFJ shall identify his relationship with the Company during such activities.

3. Starting Date

The term of this Agreement shall commence on January 1, 2004 or such other date as may be mutually agreed upon by the Parties.

4. Duration of Agreement

This agreement is open ended and shall be in effect until Terminated by either party in accordance to Article 5 below.

5. Termination

5.1. In no event may the Company Terminate this Agreement (other than for Cause as set forth in Parts 5.3 and 5.4 below) earlier than two (2) years from the date of execution of this Agreement unless mutually agreed upon by the Parties.

5.2. In the event that the Company gives TFJ the notice of its intention to Terminate this Agreement for any reason (other than for cause as set forth in Parts 5.3 and 5.4 below), the Company's only obligations to TFJ shall be to provide payments for base salary, insurance benefits, and other customary and reasonable expenses during the notice period.

5.3. The Company may immediately Terminate the employment of TFJ "for cause," as defined below, in which case the Company will have no further obligations to TFJ, other than to pay base salary and other benefits through the date of termination.

5.4. Termination "for cause" shall mean Termination of TFJ's employment with the Company because TFJ shall have committed: (a) an intentional act of fraud, embezzlement or theft in connection with his duties or in the course of his employment with the Company; (b) intentional wrongful damage to property of the Company; (c) intentional misconduct that is injurious to the Company, the Company's reputation, monetarily or otherwise (after demand for substantial performance is delivered by the Company to TFJ specifically identifying the manner in which the Company believes TFJ has engaged in intentional misconduct, and a reasonable determination is made by the Company that such misconduct has had or is likely to have material adverse effect upon the Company); (d) is charged with or subject to a credible allegation of moral turpitude; (e) an intentional breach of the provisions of Articles 10 and 11 of this Agreement. For purposes of this Agreement, no act or failure to act on the part of the TFJ shall not be deemed "intentional" if it was due primarily to a reasonable error in business judgment, but shall be deemed "intentional" only if done or omitted to be done by TFJ not in good faith and without reasonable belief that his action or omission was in the best interest of the Company.

5.5. If TFJ's employment is terminated pursuant to Articles 5.3 and 5.4 above, for cause, and if any arbitration panel selected pursuant to Article 13 hereof or any court of competent jurisdiction determines (which determination shall be final and not subject to appeal) that such termination was not authorized by this Agreement, TFJ, in addition to any other rights he may have under this Agreement or applicable law, shall be entitled to recover from HTF reasonable attorneys' fees and disbursements incurred in connection with that proceeding and shall be released from any further restrictions.

5.6. If TFJ is unable to perform his services by reason of illness, incapacity or disability for a period of three (3) months, then the Company shall have the right at the end of such three (3) month period to, in its sole discretion, either reduce the compensation paid to TFJ during any period of illness, incapacity or disability together with any bonus sums that TFJ may have been entitled to during that period or, in the alternative and without penalty of any kind, terminate this Agreement.

5.7. If TFJ should become deceased during the term of this Agreement, this Agreement shall terminate upon the date of TFJ's death, provided, however, that HTF shall pay to the estate of TFJ, any salary due up to the date thereof.

5.7. *Severance Pay*

If this Agreement is terminated by the Company (other than for cause set forth in Part 5.3 and Part 5.4 above) agrees to continue to pay to TFJ the compensation and benefits referred to in Part 6.1 and 6.2 until the earlier of (i) three (3) months after the date the termination becomes effective or (ii) until TFJ finds other employment, whichever occurs first.

6. Compensation

6.1. *Base Compensation*

During the term of this Agreement, HTF shall pay TFJ for the services contemplated by this Agreement, a gross base salary of [redacted] payable in monthly installments. From time to time, the Company may, but shall not be obligated to alter the schedule of payment of salary to a weekly or bi-weekly basis.

6.2. *Incentive Compensation*

Absent an agreement expressly to the contrary and in accordance with the terms of this Section, TFJ may be entitled to a yearly incentive compensation payment ("Bonus"). The amount of any Bonus shall be based on both the success of the company at, among other things, the achievement of strategic and sales goals set forth in the yearly Company plan ("Plan"). The Bonus to be paid shall be an amount equivalent to 18% of the base salary paid to TFJ during the year covered under the relevant Plan, provided that the profit goals set forth in the plan have been achieved. In the event that the sales goals set forth in the Plan have been exceeded, TFJ shall be paid an additional sum of not less than 2% of his base salary for the relevant Plan period. It is understood by the Parties that in the event the sales goals stated in the Plan are not achieved, no Bonus shall be due or paid. The sales goals set forth in the Plan then in effect shall be made available to TFJ for review during the course of the relevant fiscal year. Under no circumstances shall the sales goals set forth in the Plan be made available for review within 120 days from the beginning of the relevant fiscal year. The Company reserves the right to suspend or cancel the Bonus in the event of *force majeure*, including but not limited to acts of terror, God, acts of civil, or military authority, fires, epidemics, floods, earthquakes, riots, wars, sabotage, labor shortages or disputes, and governmental actions, which are beyond its reasonable control, provided that the Company gives TFJ written notice of such cause.

6.3. *Compensation Adjustment*

The Company agrees to review, on a bi-annual basis, the compensation of TFJ and, if appropriate, make whatever adjustments it may choose considering, among other factors, the success of the Company, the needs and future plans of the Company and the status of cost and wage indexes. It is understood that such reviews, in extreme circumstances may and if the welfare of the Company so requires, result in the elimination of one or more annual bonus and/or a downward adjustment of compensation.

6.4. *Insurance Benefits*

TFJ will be entitled to participate in all medical, dental, disability and life insurance benefit programs established by the Company. The medical and disability insurance benefit package will be provided to TFJ in accordance with the policies as may be established or amended from time to time by the Company.

6.5. *Retirement Benefits*

TFJ will be entitled to participate in the current and future retirement plans as may be established or amended from time to time by the Company.

6.6. *Withholding*

All compensation payable to TFJ will be subject to appropriate withholding of income, social security and other taxes and usual items.

7. Business Expenses

TFJ is authorized to incur ordinary and necessary expenses in order to meet the Company's expectation that he travel and reasonably entertain as the business of the Company requires. The Company will reimburse TFJ for all reasonable business expenses thereby incurred upon receipt of expense vouchers in a form satisfactory to the Company. The Company will reimburse only economy or coach class travel when incurred upon the authorization of the Company.

8. Vacation

In addition to the usual paid holidays, TFJ shall be entitled to earn twenty (20) days of paid vacation in each twelve-month period during the term of the Agreement. In determining time and duration of any vacation, TFJ shall duly take into consideration the business and interests of the Company. TFJ will be able to accrue (roll over) up to, but not more than five (5) days of paid vacation per year. The parties expressly agree that holidays and vacation shall be subject to the needs of the Company and may be denied or otherwise provided for, depending upon the needs of the Company.

9. Working Facilities

TFJ shall be furnished with office facilities and services commensurate with those provided to the other employees of the Company and adequate for the performance of his duties. Absent any emergency or an event of *force majeure*, TFJ shall not be required, without his consent, to perform any substantial part of the services hereunder at any place other than the places where the Company currently or subsequently maintains its existing offices and operations.

10. Prohibition of Competition with the Company

For a period of two (2) years after the Termination of this Agreement, TFJ hereby agrees not to contact or solicit any employee, vendor, supplier or customer of the Company. TFJ further agrees not to become an owner, partner, member, or, without limitation, serve in any other capacity in any enterprise that is a direct competitor of the Company in the United States, Canada, Mexico or Europe including, but not limited to, AGFA Monotype, Berthold, Émigré, The Font Bureau, FontFabrik, FontHaus, FontShop, House Industries, ITC, Linotype, MyFonts, Porchez Typofonderie, The Foundry, Thirstype or Veer. Nor will TFJ take on any direct or indirect interest in any such enterprise, advise, further, or directly or indirectly represent any such enterprise; provided, however, that the Company may agree to TFJ's employment in/with another company or in an industry competitive with the Company, in which case the Company's obligation for severance pay, if then in effect as provided above, shall immediately cease. Notwithstanding any term stated herein, TFJ hereby agrees not to use or become an owner, partner, member, or, employee, without limitation, in any other capacity in any enterprise that is a direct competitor of Company in the United States, Canada, Mexico or Europe that uses the terms, by way of example, not limitation, "Hoefler and Frere-Jones," "Hoefler and Frere-Jones Typography," "Typography.com," "Hoefler Type Foundry," "HTF," "HFJ," "H&FJ," "Frere-Jones" or any other name or title that incorporates any variant thereof, any variant of the Company name or the Company name as it may be changed from time to time.

11. Confidentiality

TFJ shall not at any time, nor in any manner, both during and after employment, either directly or indirectly, divulge, disclose or communicate to any person, company, firm, business, venture, or corporation any information or data concerning any matters affecting or relating to the business of the Company or the principals of the Company or any affiliated or related person, company, firm, business, venture, of the Company including, but not limited to, the generality of the foregoing information about any of the Company's business affairs that are not generally known in any way including, by way of example, but not limitation, manufacturing processes or designs of any of the Company's products, inventions, whether patentable or not, research and development plans and results, marketing strategies, pricing information, cost information, strategic information, databases, tools, techniques and processes and other plans for the current and future conduct of any of the Company's business, financial information, or other operating data or intellectual property which is not published or released, and the identity and relationship with customers and sales prospects.

The Parties stipulate and agree that the above-listed information is important, material and confidential and substantially affects the effective and successful conduct of the business and the commercial goodwill of the Company. An inadvertent breach of the terms of this Section shall not be material breach of this Agreement. The provisions of this Section shall bind the parties subsequent to the termination of this Agreement irrespective of the reason for Termination.

12. Intellectual Property

All ideas, designs, programs, creations, discoveries, inventions, suggestions or improvements by TFJ which in any way relate to or in connection with the business or products, pricing, costs, sales and/or processes of the Company shall be the sole and exclusive property of the Company. TFJ hereby further agrees to assign all right and title to any type fonts developed while employed by the Company or which, prior to the execution of this Agreement, the Company has assisted in developing, used, offered for sale or otherwise promoted. The Company will use commercially best efforts to ensure that TFJ receives a design credit for the works TFJ designs. The Company shall have no obligation to enforce the display of a design credit for TFJ in the event a client, customer or end-user of the Company's products or services decides against, prohibits or otherwise prevents or fails to provide a TFJ design credit display or attribution.

For consideration received, TFJ agrees to assign, and does hereby assign, to the Company, all right, title and interest in and to any idea, concept, design, photograph, program, discovery, design or invention, including but not limited to, all patent rights, trademark rights and copyright rights (hereinafter "Innovations") conceived, created or developed, whether solely or jointly, during the period of TFJ's employment with the Company, provided that the Innovation relates in any way to the business of the Company. TFJ agrees to promptly disclose Innovations to the Company when they are made or discovered. In addition, TFJ, at the Company's expense, further agrees to execute such further assignments and other documents, and to take such actions as reasonably required by the Company to secure, protect and enforce the Company's rights in and to the Innovations. The commitment of TFJ hereunder shall survive the Termination of his employment for a period of not more than one (1) year.

It is understood between the Parties that from time to time, TFJ may engage in outside activities or create other design related products or services that may fall outside of the scope of his responsibilities. In the event TFJ decides to commercially exploit or otherwise publish or display any such works or creations, TFJ hereby agrees to disclose such activity, product or service to the Company in a form sufficient for the Company to evaluate the activity, product or service. Under such circumstances, the Company shall have a right of first refusal to consider and undertake the publication, display or other commercial exploitation of any such work or creation, the terms of publication, display or commercial exploitation of which shall be mutually agreed upon in a written agreement executed by the Parties.

TFJ hereby agrees to the use of his name and likeness in the identification of the Company (Hoefler & Frere-Jones Typography and such other variations as may be used by the Company). For consideration received, TFJ agrees that the Company shall own all right and title to the changed name and may, but shall not be required, to amend the Company title to reflect the changed name, use the changed name as a "d/b/a" and shall be further entitled to register any copyright or trademark in connection therewith.

13. Arbitration and Other Relief

Any dispute between the Parties under or related to this Agreement shall be resolved (except as provided below) through formal arbitration by an arbitrator experienced with such matters and selected under the rules of the American Arbitration Association and the Arbitration shall be conducted under the rules of said Association in the Association office located in New York, New York. Each Party shall be entitled to present evidence and argument to the arbitrator. The arbitrator shall have the ability to interpret and apply the provisions of this Agreement. Notwithstanding the foregoing, the Parties expressly agree that the arbitrator shall not have the authority to amend or change any provision of this Agreement. The arbitrator shall permit and supervise reasonable pre-hearing discovery of facts, solely to the extent necessary to establish a claim or defense to a claim. The determination of the arbitrator shall be conclusive and binding upon the Parties and judgment upon the same may be entered in any court having jurisdiction thereof. The arbitrator shall give written notice to the parties stating his or her or their determination, and shall furnish to each Party a signed copy of such determination. Each party shall bear their own expenses related to any arbitration.

TFJ hereby acknowledges that the services to be rendered under this Agreement are of a unique, special and extraordinary character which would be difficult or impossible for the Company to replace, and that monetary damages will not adequately compensate the Company for its losses arising out of any breach of the provisions of this Agreement. The Company shall, prior to seeking injunctive relief, attempt to negotiate an amicable resolution to any event or actions that may be damaging to the Company. Absent any such resolution and in addition to any other rights and remedies available hereunder, at law or equity, the Company shall be entitled to injunctive relief enjoining and restraining TFJ from committing any violation of the various terms and conditions of this Agreement.

14. Return of Documents

Upon Termination of employment for any reason, TFJ agrees, upon request, to promptly return to the Company all papers, documents or records including, without limitation, originals, carbons, diskettes and any other form of original or copy thereof as well as, notes, plans, databases, digital files, drawings, sales materials, programs, financial statements or projections, together with any other evidence or record of proprietary techniques, know-how, designs, client lists, marketing contact lists and programs, sales plans together with any other item, material or list relating to the general business activities of the Company or the manufacturing, operations, sales, pricing and costs of the Company.

15. Indemnity

The Company will indemnify, defend, hold harmless and otherwise protect TFJ to the fullest extent permitted by law in connection with any and all claims, charges, actions, lawsuits, investigations or any other legal proceedings arising out of or in any way relating to any act or omission by TFJ made within the scope of his employment and in the course of his employment with the Company. In the event of any actual or potential conflict of interest between the Company and TFJ in connection with said claim, charge or other legal proceeding, TFJ will have the option of obtaining legal counsel of his choosing. In the event TFJ declines to seek the advice of counsel, defend or maintain any action related to TFJ's actions for or on behalf of the Company, nothing herein shall prevent the Company from bringing, maintaining or defending any action as it may choose.

TFJ hereby represents and warrants that all rights and titles granted herein are not encumbered, hypothecated or otherwise impaired and that no condition, obligation, suit or legal action, whether personal, civil, criminal or regulatory is known, threatened or pending that may result in the revocation or impairment of any obligation or duty of TFJ to the Company or any right or title granted by TFJ to the Company herein. TFJ further represents and warrants that he is authorized to enter into this Agreement and to perform the obligations and duties identified herein. TFJ agrees to indemnify, defend, hold harmless and otherwise protect the Company to the fullest extent permitted by law in connection with any and all claims, charges, actions, lawsuits, investigations or any other legal proceedings arising out of TFJ's breach of any promise, representation or warranty made herein.

16. Effective of Waiver

No waiver by either Party, whether express or implied, of any provision of this Agreement shall constitute a continuing waiver of such provision or a waiver of any other provision of this Agreement. No waiver by either Party, whether express or implied, of any breach or default by the other Party, shall constitute a waiver of any other breach or default of the same or any other provision of this Agreement.

17. Notice

Any and all notices referred to herein shall be sufficient if furnished in writing and sent by certified mail to the parties at the then current permanent mailing address of each party. TFJ will address all such notices to the President of the Company at his or her address on the Company's records.

18. Governing Law

The Parties agree to settle all disputes, controversies, or claims relating to or arising from this Agreement in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA Rules") in effect as of the Effective Date of this Agreement. The terms and provisions herein contained and all disputes or claims relating to this Agreement shall be interpreted, construed and enforced in accordance with the laws of the State of New York without giving effect to its conflict of law principles or the conflict of law principles of any other jurisdiction. All Arbitration Conferences and Hearings will be held in New York, New York. In all other circumstances, the Parties specifically consent to the jurisdiction of the state and federal courts of New York over any action arising out of or related to this Agreement. The Company expressly reserves any and all rights to pursue equitable relief including, but not limited to, temporary restraining orders and preliminary injunctions, irrespective of the AAA Rules.

19. Amendment

The Agreement may be amended in writing signed by TFJ and an officer of the Company specifically authorized to amend this Agreement.

Signatures on Next Page

TOBIAS FRERE-JONES

By: Tobias Frere-Jones

Signed in New York, New York on
this 9 day of March, 2004.

THE HOEFLER TYPE FOUNDRY, INC.

By: Jonathan Hoefler
Jonathan Hoefler, President

Signed in New York, New York on
this 9th day of March, 2004.

REQUEST FOR JUDICIAL INTERVENTION

UCS-840 (7/2012)

For Court Clerk Use Only:
IAS Entry Date
Judge Assigned
RJI Date

Supreme COURT, COUNTY OF New York

Index No: 650139/2014 Date Index Issued: 01/16/2014

CAPTION: Enter the complete case caption. Do not use et al or et ano. If more space is required, attach a caption rider sheet.

Tobias Frere-Jones

Plaintiff(s)/Petitioner(s)

-against-

Jonathan Hoefler

Defendant(s)/Respondent(s)

NATURE OF ACTION OR PROCEEDING: Check ONE box only and specify where indicated.

MATRIMONIAL

- ○ Contested

NOTE: For all Matrimonial actions where the parties have children under the age of 18, complete and attach the **MATRIMONIAL RJI Addendum.**

For Uncontested Matrimonial actions, use RJI form UD-13.

TORTS

- ○ Asbestos
- ○ Breast Implant
- ○ Environmental: _____ (specify)
- ○ Medical, Dental, or Podiatric Malpractice
- ○ Motor Vehicle
- ○ Products Liability: _____ (specify)
- ○ Other Negligence: _____ (specify)
- ○ Other Professional Malpractice: _____ (specify)
- ○ Other Tort: _____ (specify)

OTHER MATTERS

- ○ Certificate of Incorporation/Dissolution [see NOTE under Commercial]
- ○ Emergency Medical Treatment
- ○ Habeas Corpus
- ○ Local Court Appeal
- ○ Mechanic's Lien
- ○ Name Change
- ○ Pistol Permit Revocation Hearing
- ○ Sale or Finance of Religious/Not-for-Profit Property
- ○ Other: _____ (specify)

COMMERCIAL

- ○ Business Entity (including corporations, partnerships, LLCs, etc.)
- ◉ Contract
- ○ Insurance (where insurer is a party, except arbitration)
- ○ UCC (including sales, negotiable instruments)
- ○ Other Commercial: _____ (specify)

NOTE: For Commercial Division assignment requests [22 NYCRR § 202.70(d)], complete and attach the **COMMERCIAL DIV RJI Addendum.**

REAL PROPERTY: How many properties does the application include? _____

- ○ Condemnation
- ○ Mortgage Foreclosure (specify): ○ Residential ○ Commercial

Property Address: _____ (Street Address / City / State / Zip)

NOTE: For Mortgage Foreclosure actions involving a one- to four-family, owner-occupied, residential property, or an owner-occupied condominium, complete and attach the **FORECLOSURE RJI Addendum.**

- ○ Tax Certiorari - Section: _____ Block: _____ Lot: _____
- ○ Tax Foreclosure
- ○ Other Real Property: _____ (specify)

SPECIAL PROCEEDINGS

- ○ CPLR Article 75 (Arbitration) [see NOTE under Commercial]
- ○ CPLR Article 78 (Body or Officer)
- ○ Election Law
- ○ MHL Article 9.60 (Kendra's Law)
- ○ MHL Article 10 (Sex Offender Confinement-Initial)
- ○ MHL Article 10 (Sex Offender Confinement-Review)
- ○ MHL Article 81 (Guardianship)
- ○ Other Mental Hygiene: _____ (specify)
- ○ Other Special Proceeding: _____ (specify)

STATUS OF ACTION OR PROCEEDING: Answer YES or NO for EVERY question AND enter additional information where indicated.

	YES	NO	
Has a summons and complaint or summons w/notice been filed?	◉	○	If yes, date filed: 01/16/2014
Has a summons and complaint or summons w/notice been served?	◉	○	If yes, date served: 01/16/2014
Is this action/proceeding being filed post-judgment?	○	◉	If yes, judgment date: _____

NATURE OF JUDICIAL INTERVENTION:

Check ONE box only AND enter additional information where indicated.

- ○ Infant's Compromise
- ○ Note of Issue and/or Certificate of Readiness
- ○ Notice of Medical, Dental, or Podiatric Malpractice — Date Issue Joined: _____
- ◉ Notice of Motion — Relief Sought: Dismiss — Return Date: April 21, 2014
- ○ Notice of Petition — Relief Sought: _____ — Return Date: _____
- ○ Order to Show Cause — Relief Sought: _____ — Return Date: _____
- ○ Other Ex Parte Application — Relief Sought: _____
- ○ Poor Person Application
- ○ Request for Preliminary Conference
- ○ Residential Mortgage Foreclosure Settlement Conference
- ○ Writ of Habeas Corpus
- ○ Other (specify): _____

RELATED CASES:

List any related actions. For Matrimonial actions, include any related criminal and/or Family Court cases. If additional space is required, complete and attach the **RJI Addendum**. If none, leave blank.

Case Title	Index/Case No.	Court	Judge (if assigned)	Relationship to Instant Case

PARTIES:

For parties without an attorney, check "Un-Rep" box AND enter party address, phone number and e-mail address in space provided. If additional space is required, complete and attach the **RJI Addendum**.

Un-Rep	Parties: List parties in caption order and indicate party role(s) (e.g. defendant; 3rd-party plaintiff).	Attorneys and/or Unrepresented Litigants: Provide attorney name, firm name, business address, phone number and e-mail address of all attorneys that have appeared in the case. For unrepresented litigants, provide address, phone number and e-mail address.	Issue Joined (Y/N):	Insurance Carrier(s):
☐	Frere-Jones (Last Name) Tobias (First Name) Primary Role: Plaintiff Secondary Role (if any):	Newman (Last Name) Fredric (First Name) Hoguet Newman Regal & Kenney, LLP (Firm Name) 10 East 40th Street (Street Address) New York (City) New York (State) 10016 (Zip) +1 (212) 689-8808 (Phone) +1 (212) 689-5101 (Fax) fnewman@hnrklaw.com (e-mail)	○ YES ◉ NO	No
☐	Frere-Jones (Last Name) Tobias (First Name) Primary Role: Plaintiff Secondary Role (if any):	Lin (Last Name) Kerin (First Name) Hoguet Newman Regal & Kenney, LLP (Firm Name) 10 East 40th Street (Street Address) New York (City) New York (State) 10016 (Zip) +1 (212) 689-8808 (Phone) +1 (212) 689-5101 (Fax) klin@hnrklaw.com (e-mail)	○ YES ◉ NO	No
☐	Hoefler (Last Name) Jonathan (First Name) Primary Role: Defendant Secondary Role (if any):	DeLarco (Last Name) Michael (First Name) Hogan Lovells US LLP (Firm Name) 875 Third Avenue (Street Address) New York (City) New York (State) 10022 (Zip) +1 (212) 918-3000 (Phone) +1 (212) 918-3100 (Fax) michael.delarco@hoganlovells.com (e-mail)	○ YES ◉ NO	No
☐	Hoefler (Last Name) Jonathan (First Name) Primary Role: Defendant Secondary Role (if any):	Baron (Last Name) David (First Name) Hogan Lovells US LLP (Firm Name) 875 Third Avenue (Street Address) New York (City) New York (State) 10022 (Zip) +1 (212) 918-3000 (Phone) +1 (212) 918-3100 (Fax) devid.baron@hoganlovells.com (e-mail)	○ YES ◉ NO	No

I AFFIRM UNDER THE PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: 3/6/14

3923398
ATTORNEY REGISTRATION NUMBER

Michael DeLarco
SIGNATURE

Michael DeLarco
PRINT OR TYPE NAME

Print Form

SUPREME COURT OF THE STATE OF NEW YORK

UCS-840C 3/2011

COUNTY OF New York

Tobias Frere-Jones

Plaintiff(s)/Petitioner(s)

-against-

Jonathan Hoefler

Defendant(s)/Respondent(s)

Index No. 650139/2014

RJI No. (If any) _____

COMMERCIAL DIVISION
Request for Judicial Intervention Addendum

COMPLETE WHERE APPLICABLE [add additional pages if needed]:

Plaintiff/Petitioner's cause(s) of action [check all that apply]:

- [x] Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g. unfair competition), or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings (e.g. sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, and other business agreements; trade secrets; restrictive covenants; and employment agreements not including claims that principally involve alleged discriminatory practices)
- [ ] Transactions governed by the Uniform Commercial Code (exclusive of those concerning individual cooperative or condominium units)
- [ ] Transactions involving commercial real property, including Yellowstone injunctions and excluding actions for the payment of rent only
- [ ] Shareholder derivative actions — without consideration of the monetary threshold
- [ ] Commercial class actions — without consideration of the monetary threshold
- [ ] Business transactions involving or arising out of dealings with commercial banks and other financial institutions
- [ ] Internal affairs of business organizations
- [ ] Malpractice by accountants or actuaries, and legal malpractice arising out of representation in commercial matters
- [ ] Environmental insurance coverage
- [ ] Commercial insurance coverage (e.g. directors and officers, errors and omissions, and business interruption coverage)
- [ ] Dissolution of corporations, partnerships, limited liability companies, limited liability partnerships and joint ventures — without consideration of the monetary threshold
- [ ] Applications to stay or compel arbitration and affirm or disaffirm arbitration awards and related injunctive relief pursuant to CPLR Article 75 involving any of the foregoing enumerated commercial issues — without consideration of the monetary threshold

Plaintiff/Petitioner's claim for compensatory damages [exclusive of punitive damages, interest, costs and counsel fees claimed]:

$ 20 million

Plaintiff/Petitioner's claim for equitable or declaratory relief [brief description]:

None

Defendant/Respondent's counterclaim(s) [brief description, including claim for monetary relief]:

None

I REQUEST THAT THIS CASE BE ASSIGNED TO THE COMMERCIAL DIVISION. I CERTIFY THAT THE CASE MEETS THE JURISDICTIONAL REQUIREMENTS OF THE COMMERCIAL DIVISION SET FORTH IN 22 NYCRR § 202.70(a), (b) AND (c).

Dated: 03/14/2014

SIGNATURE

Michael DeLarco

PRINT OR TYPE NAME

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER

Defendant.

Index No. 650139/2014

MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFF'S MOTION TO DISMISS THE COMPLAINT

Fredric S. Newman
Kerin P. Lin
HOGUET NEWMAN REGAL & KENNEY LLP
10 East 40th Street
New York, NY 10016
Telephone: (212) 689-8808

Attorneys for Plaintiff Tobias Frere-Jones

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other

PRELIMINARY STATEMENT

This is a motion to dismiss a complaint that fully and clearly alleges the following facts, which, of course, must be accepted as true and viewed most favorably to plaintiff:

In 1999, Plaintiff Tobias Frere-Jones and Defendant Jonathan Hoefler agreed that they would become equal owners in The Hoefler Type Foundry, Inc. ("HTF"). Specifically, their agreement was that Frere-Jones would contribute to HTF his name, reputation, industry connections and design authority, as well as certain fonts he had already developed and owned or would own when he left his former company (referred to as the "Dowry Fonts"), valued in excess of $3 million.

In exchange, Hoefler agreed that he would transfer to Frere-Jones half of Hoefler's equity in HTF, the company that would conduct their jointly-owned business.

Frere-Jones fully performed all of his agreed obligations, and he moved to New York to do so. Deplorably, Hoefler accepted all of the benefits provided by Frere-Jones – including the tremendous recognition, success and prosperity that resulted when HTF changed its name to "Hoefler & Frere-Jones" – but, although Hoefler repeatedly promised Frere-Jones that he would transfer the agreed 50% share of HTF's equity, he did not do so. Finally, on October 21, 2013, Hoefler told Frere-Jones that he would not be transferring the equity as he had promised.

Recognizing that he has no legal or factual basis to dismiss the complaint, Hoefler has submitted a motion built entirely upon (1) Hoefler's misrepresentation of the very documentary evidence he presents to support his motion, (2) Hoefler's denial of facts belied by an exhaustive written record referred to in the Complaint, and (3) Hoefler's reliance upon inferences, not facts, drawn most favorably to himself and not, as universally required by New York law, in favor of the plaintiff, Frere-Jones.

First, Hoefler tenders to this court two contracts signed between Frere-Jones and HTF, the corporation of which Frere-Jones was to become half-owner. (Affirmation of Michael DeLarco ("DeLarco Aff.") Exs. A, B). HTF is a New York corporation, duly organized and currently actively registered with the New York Department of State. Defendant Hoefler is the President of HTF and, together with his wife, the sole stockholders. The two agreements were executed by HTF, the corporation, not by Hoefler the individual. Each agreement expressly states that HTF is the "Party" to the contract, and Hoefler expressly signed each agreement in his capacity as President of HTF and not individually. Nevertheless, eight times in eight separate places in Hoefler's Memorandum of Law In Support of Defendant's Motion to Dismiss the Complaint dated March 6, 2014 (hereafter, "Brief"), Hoefler represents to this Court that he, Hoefler the individual, is a party to the tendered agreements. (Brief at 1-2, 3, 5 (twice), 6, 8, 15 and 16). That representation is plainly not true and should not be permitted to support Hoefler's motion to dismiss Frere-Jones's well-pleaded complaint.

Second, Hoefler "categorically denies Plaintiff's allegations – including the very existence of the alleged 1999 'oral agreement' on which they are based." (Brief at 1). Respectfully submitted in the accompanying Frere-Jones Affidavit are numerous emails from Hoefler establishing the substance of the agreement, that the two men would become equal owners, or "partners," of HTF.[1] These range from an email written on October 2, 2002 in which Hoefler represented to a prospective client, "[s]ince 1999, Tobias has been a partner at the Hoefler Type Foundry," to one written as recently as August 8, 2012 in which Hoefler again represented to a prospective client, the Smithsonian Institute, "My partner Tobias Frere-Jones (the Frere-Jones in 'Hoefler & Frere-Jones') asked me to send his apologies for missing the call."

[1] Affidavits may be used to supplement a complaint's allegations upon a motion to dismiss. *Mulder v. Donaldson, Lufkin & Jenrette*, 208 A.D.2d 301, 307, 632 N.Y.S.2d 560, 564 (1st Dep't 1995) ("it is well settled that affidavits may be used to remedy defects in the complaint and supplement its allegations upon a motion to dismiss.").

(Affidavit of Plaintiff Tobias Frere-Jones ("Frere-Jones Aff.") Exs. E, F). The essence of Hoefler's denial is that Frere-Jones was merely an employee and not an owner of the business that bore his name. How can he possibly make that assertion on a motion to dismiss a well-pleaded complaint in the face of his own representations to the public and to Frere-Jones that they were "partners?"

Furthermore, Hoefler's unsworn and unsupported denial is completely refuted by the undisputed fact that Frere-Jones gave the Dowry Fonts to HTF for the nominal consideration of $10. He did that with the understanding from Hoefler that he would own half of HTF. There is no reason in the world why Frere-Jones would have given away millions of dollars of valuable property without an express commitment from Hoefler, his friend and partner, and Frere-Jones has so alleged in his complaint. (*See* Compl. ¶¶ 26-28; Frere-Jones Aff. ¶ 14).

Finally, the main legal premise of the motion to dismiss is that the claims, though well-pleaded, are time-barred because Frere-Jones should have known (not knew) that Hoefler was not living up to his agreement when the promised equity was not forthcoming in 2004, despite assurances to the contrary from Hoefler. That is an inference, not a fact, and may not be drawn in Hoefler's favor on a motion to dismiss, particularly in light of the express factual allegation that Frere-Jones first learned of Hoefler's change of heart on October 21, 2013.

ARGUMENT

I. ALL FACTS ALLEGED IN THE COMPLAINT ARE TAKEN AS TRUE

This is a motion to dismiss. All facts in the Complaint must be accepted as true. In this Memorandum, we have incorporated relevant facts into the arguments instead of repeating the Complaint in a separate section. The Complaint is attached to the DeLarco Affirmation as Exhibit C.

On this motion to dismiss pursuant to CPLR 3211, "the pleadings are necessarily afforded a liberal construction." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 865 (2002). The court must "accept the facts as alleged in the complaint as true, accord Plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974 (1994). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 175 (2005). Moreover, "[c]ourts should not strain to deprive plaintiffs of their day in court and, when a complaint can be reasonably construed as alleging a cause of action which is not time-barred, the complaint should not be dismissed but the action should proceed to trial at which time the plaintiffs should be permitted to prove their causes of action." *Emord v. Emord*, 193 A.D.2d 775, 776, 598 N.Y.S.2d 266, 267 (2d Dep't 1993). Importantly, "issues are [sic] facts are not properly resolved on a motion to dismiss," and the court may not make factual determinations. *Universal-MCA Music Publ'g v. Bad Boy Entm't, Inc.*, No. 601935-02, 2003 WL 21497318, at *15-16 (Sup. Ct. N.Y. Cnty. June 18, 2003).

II. THE DOCUMENTARY EVIDENCE SUPPORTS PLAINTIFF'S CLAIMS

A. Hoefler is Not a Party to the Two Agreements He Tenders

Hoefler's motion to dismiss under New York Practice Law and Rule 3211 (a)(1) is founded upon two agreements signed by Plaintiff which Hoefler claims "govern the relationship" between the parties: the Sale and Assignment of Type Fonts and the Employment Agreement, both dated March 9, 2004. (DeLarco Aff. Exs. A, B). Despite that repeated misrepresentation in his Brief, however, Hoefler is not a party to those agreements. HTF, the corporation Frere-Jones should have co-owned, is. The mischaracterization that Hoefler was a party to those agreements

permeates the entire Brief. It is repeated eight times in the first 16 of the 23 pages of the Brief. Thus, beginning on page 1:

MISREPRESENTATION	PAGE
Hoefler states that he and Plaintiff executed the two agreements "to govern the parties' relationship"	1-2
Frere-Jones's "negotiated two written agreements with Hoefler in 2004 regarding their relationship...."	3
"the Assignment Agreement clearly states that Plaintiff and Hoefler executed it as 'independent entities'...."	4-5
"Plaintiff also entered into an 'Employment Agreement' with HTF whereby HTF and Hoefler would 'employ Plaintiff'...."	5
"Finally, as consideration for Hoefler and HTF entering into the Employment Agreement..."	6
"Plaintiff had assigned the Dowry Fonts to Hoefler/HTF under the Assignment Agreement...."	8
"two valid and enforceable written contracts with Hoefler as to the subject matter of his claims"	15
"Plaintiff and Hoefler executed the Agreement as 'independent entities'"	16

The express language of the two agreements Hoefler purports to quote is exactly contrary and disproves Hoefler's assertions. To begin, the very first lines of each of the two agreements are identical in defining HTF (not Hoefler individually) as the "Party":

> THIS AGREEMENT entered into between The Hoefler Type Foundry, Inc. ("HTF" or "Company"), having an office at 61 1 Broadway, Suite 608, New York, New York 10012-2608 and Tobias Frere-Jones ("TFJ") residing at 194 Bleecker Street, Apt 3-A, New York, New York 10012 (individually a "Party" together, the "Parties"). (DeLarco Aff. Exs. A, B).

Additionally, each of the two agreements is signed as "The Hoefler Type Foundry, Inc. by Jonathan Hoefler, President." (*Id.*) Jonathan Hoefler, individually, is not a signatory.

That a corporation is an entity separate from its shareholders and officers is the fundamental basis of corporate law. *Port Chester Elec. Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 656, 389 N.Y.S.2d 327, 331 (1976) ("Corporations, of course, are legal entities distinct from

their managers and shareholders and have an independent legal existence."); *Bowery Sav. Bank v. 130 E. 72nd St. Realty Corp.*, 173 A.D.2d 364, 364, 569 N.Y.S.2d 732, 733 (1st Dep't 1991) ("it is axiomatic that a corporation is a legal entity separate and distinct from its shareholders."); *see generally*, *Corpus Juris Secundum* on Corporations (18 C.J.S. Corporations § 6).

Next, the two agreements do not, as Hoefler misleadingly argues, "govern the parties' relationship." Putting aside the inaccurate claim that Hoefler is a "party" to the agreements – though he duplicitously tries to squeeze himself into the contracts by conflating the two separate entities into "Hoefler/HTF" (e.g. Brief at 8) – the agreements do not address Frere-Jones's fundamental claim in this case, that Hoefler, the man and Frere-Jones's business partner, promised to give him half of his shares in HTF. That promise is not treated in any way in either agreement. The best Hoefler can say on this motion is that it should have been; but it wasn't.

B. The Two Agreements Do Not Conclusively Establish Hoefler's Defense

To prevail on a motion to dismiss pursuant to N.Y. C.P.L.R. 3211(a)(1), "the moving party must show that the documentary evidence conclusively refutes plaintiff's [ ] allegations." *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 590-591, 808 N.Y.S.2d 573, 577 (2005); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270, 780 N.Y.S.2d 593, 595-596 (1st Dep't 2004). It is well-settled that such a dismissal is warranted only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen*, 98 N.Y.2d at 326, 746 N.Y.S.2d at 865; *Correa v. Orient-Express Hotels, Inc.*, 84 A.D.3d 651, 651, 924 N.Y.S.2d 336, 337 (1st Dep't 2011); *DKR Soundshore Oasis Holding Fund Ltd. v. Merill Lynch Int'l*, 80 A.D.3d 448, 449, 914 N.Y.S.2d 145, 147 (1st Dep't 2011); *Weston v. Cornell Univ.*, 56 A.D.3d 1074, 1074, 868 N.Y.S.2d 364, 365 (3d Dep't 2008).

The First Department applies the "conclusively establish a defense" requirement rigorously as a matter of practice as well as policy. In *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., supra,* the motion court was presented with 17 different exhibits, including over 700 pages of testimony from a related proceeding accompanied by a three-page summary providing an overview of proposed testimony. In reversing a successful motion to dismiss a counterclaim based on that documentary evidence, the First Department found that despite Weil's lengthy documentary submissions, the submissions were of a type that "do not meet the CPLR 3211(a)(1) requirement of conclusively establishing [the] defense as a matter of law." Also, the First Department noted that the motion court had failed to take into account the many ways that the witness's full testimony could have led to conclusions favorable to the defendant. 10 A.D.3d 271, 780 N.Y.S.2d 595-96 (citations and quotations omitted).

The Second and Third Appellate Divisions are equally skeptical of motions to dismiss based upon documentary evidence. Where a relevant ambiguity is found in the documentary evidence, a motion to dismiss should not be granted. *Weston*, 56 A.D.3d at 1074, 868 N.Y.S.2d at 365. Here, there is an abundance of problematic ambiguities, starting with the fact that Hoefler is not a party to the very documents he relies upon. In *Paramount Transportation Systems, Inc. v. Lasertone Corp.*, the Second Department rejected a motion to dismiss when the tendered document did not conclusively establish defendant's contention that it contracted with an entity separate from plaintiff called "R+L Carriers, Inc.," where the plaintiff did business under the name "R+L Carriers." 76 A.D.3d 519, 519, 907 N.Y.S.2d 498, 499 (2d Dep't 2010). In *Weston v. Cornell University*, the Third Department denied a motion to dismiss the plaintiff professor's breach of contract claim against Cornell University over the issue of tenure. There, the court found the university's written employment offer to the professor to be ambiguous as to

tenure where one paragraph appointed the plaintiff with tenure but another paragraph contradictorily discussed the tenure application process. 56 A.D.3d at 1074, 868 N.Y.S.2d at 365.

Here, it cannot be conclusively established as a matter of law, from the documents, that Hoefler's agreement to a 50-50 split should have been included in one of the two agreements, or both of them. Indeed, it is not uncommon for equity terms and employee compensation terms to be found in entirely different agreements. *See, e.g., Mosionzhnik v. Chowaiki*, 41 Misc. 3d 822, 972 N.Y.S.2d 841, 844, 849 (Sup. Ct. N.Y. Cnty. 2013) (parties executed separate shareholder agreements and employment agreements); *Lande v. Radiology Specialists of Kingston P.C.*, 806 F. Supp. 1084, 1086 (S.D.N.Y. 1992) (defendants executed shareholder agreements separate from their employment agreement).

Moreover, the Employment Agreement does not even contain a standard merger or integration clause stating, in substance, that it supersedes and embodies all previous agreements whether oral or written between the parties. The absence of such a clause, without more, is fatal to Hoefler's claim that the agreements "govern the parties' relationship." *See Saxon Capital Corp. v. Wilvin Assocs.*, 195 A.D.2d 429, 430, 600 N.Y.S.2d 708, 709 (1st Dep't 1993) (finding against the drafter concerning the completeness of a contract when there was no merger clause).

Finally, the two agreements were drafted by counsel for HTF, and Frere-Jones did not have a lawyer involved because he trusted Hoefler to handle the legal technicalities of their company's business. (Frere-Jones Aff. ¶¶ 5, 14; *See also* Compl. ¶¶ 17, 26). "Nothing is better settled than that such a document is to be construed strictly against the draftsman." *M. N. S. Brandell, Inc. v. Roosevelt Nassau Operating Corp.*, 42 A.D.2d 708, 709, 345 N.Y.S.2d 608, 610 (2d Dep't 1973); *see also Matter of Riconda*, 90 N.Y.2d 733, 739, 665 N.Y.S.2d 392, 397

(1997); *SOS Oil Corp. v. Norstar Bank*, 76 N.Y.2d 561, 568, 561 N.Y.S.2d 887, 890 (1990) ("As in the interpretation of any document, we look for the parties' intent within the four corners of the instrument, reading any ambiguity against the drafter."); *Saxon Capital Corp.*, 195 A.D.2d at 430, 600 N.Y.S.2d at 709; *see generally* Restatement (Second) of Contracts § 206 (1981) (e.g. "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

C. The Documentary Evidence Submitted by Frere-Jones Also Requires the Motion to be Denied

Not only are the two agreements tendered by Hoefler insufficient to require dismissal as a matter of law, but also the allegations of the Complaint are well-supported by documentary evidence referred to in the Complaint and provided to this Court by Plaintiff in his accompanying affidavit. In the Complaint, Frere-Jones alleges that the basic deal was that he and Hoefler would become "equal partners in a new venture housed in HTF." They worked together for years to create a significant business. Importantly, between 1999 and 2004, they repeatedly discussed completing their basic deal and rebranding the company as "Hoefler & Frere-Jones". Finally, after five years, they did change the name under which the business operated. (Compl. ¶¶ 12, 21, 22, 33).

Hoefler categorically denies, on page 1 of his Brief, that there was an oral agreement for the two men to become equal owners of HTF. That denial is completely debunked by Hoefler's own words. Hoefler repeatedly acknowledged his undertaking by holding Frere-Jones out as his "partner" both internally and externally. Numerous emails and other company materials written by Hoefler spanning the entire period of their relationship refer to the two men as partners. (Frere-Jones Aff. Exs. A-L).

For example, in October 2002, Hoefler represented to a prospective client, "[s]ince 1999, Tobias has been a partner at the Hoefler Type Foundry." (Frere-Jones Aff. Ex. E). Again, in an email written as recently as August 8, 2012 Hoefler represented to a prospective client, the Smithsonian Institute, "my partner Tobias Frere-Jones (the Frere-Jones in 'Hoefler & Frere-Jones') asked me to send his apologies for missing the call." (Frere-Jones Aff. Ex. F). There is even one email in which Hoefler proclaims to Frere-Jones, "it's possible that your partner is a genius". (Frere-Jones Aff. Ex. H).

It really is beyond dispute that "partner" connotes a relationship of proprietorship and, vis-à-vis other partners, trust. Hoefler's unsupported (and unsworn) denial, when completely refuted by his own words in his own documents, cannot justify his motion to dismiss.

And, of course, the business prospered under the name "Hoefler & Frere-Jones."

III. PLAINTIFF'S CLAIMS ACCRUED ON OCTOBER 21, 2013 AND ARE NOT BARRED BY ANY APPLICABLE STATUTE OF LIMITATIONS

In his complaint, Frere-Jones alleges that he first learned that Hoefler reneged on his personal agreement to transfer 50% of HTF on October 21, 2013. (Compl. ¶ 42). That is a clear, unequivocal allegation and on this motion to dismiss must be taken as true. *Leon*, 84 N.Y.2d at 87-88, 614 N.Y.S.2d at 974. Up to that time, Hoefler had "repeatedly acknowledged his obligation" to transfer half the ownership of HTF to Frere-Jones. (*See e.g.* Compl. ¶¶ 2, 29, 35). Indeed, on July 31, 2013, Hoefler responded to an inquiry from Frere-Jones about the equity with "Stop it. I'm working on it. Stop harassing me." (Compl. ¶ 41). These allegations must also be taken as true. *Roni LLC v. Arfa*, 18 N.Y.3d 846, 939 N.Y.S.2d 746 (2011).

The premise of Hoefler's limitations argument on this motion is at most a pessimistic view of human relations, that when a business partner says "later", he means "never." Hoefler argues that as soon as Frere-Jones performed and Hoefler didn't, Frere-Jones should have sued

immediately because he should have known at that point that Hoefler did not intend to transfer equity in HTF as he had promised.

There is absolutely no evidence that, in fact, Frere-Jones knew before October 21, 2013 that Hoefler had breached his contract as alleged in the Complaint. There is only Hoefler's cynical argument that Frere-Jones should have suspected Hoefler's treachery sooner, an impermissible inference against Frere-Jones on this motion to dismiss. *Weil, Gotshal & Manges, LLP*, 10 A.D.3d at 270, 780 N.Y.S.2d at 595-596; *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 672 N.Y.S.2d 8, 13 (1st Dep't 1998); *Power Test Petroleum Distribs, Inc. v. Northville Indus. Corp.*, 114 A.D.2d 405, 494 N.Y.S.2d 129, 131 (2d Dep't 1985).

After all, it took Hoefler and Frere-Jones five years, 1999-2004, to complete the first part of their deal. Given that pace, the trier of fact could surely conclude that Frere-Jones acted reasonably in not suspecting that his friend and business partner would breach his agreement.

Moreover, "[c]ourts should not strain to deprive a plaintiff of his day in court, where the complaint can be reasonably construed as alleging a cause of action which is not time-barred. The appropriate forum to ascertain the true facts in the context of the pleadings is in the trial courtroom." *Quadrozzi Contrete Corp. v. Mastroianni*, 56 A.D.2d 353, 358, 392 N.Y.S.2d 687, 690 (2d Dep't 1977). A plaintiff should be allowed to proceed to trial where he will have the opportunity, and the burden, of proving that his cause of action is within the appropriate statute of limitations. *Emord*, 193 A.D.2d at 776, 598 N.Y.S.2d at 267.

Finally, Hoefler's statute of limitations defense depends upon a favorable resolution of a factual issue — whether Frere-Jones should have been on notice of Hoefler's breach in 2004 – a determination that cannot be properly determined on a pre-answer motion to dismiss. *Correa*, 84 A.D.3d at 651, 924 N.Y.S.2d at 337; *City Line Auto Mall, Inc. v. Citicorp Leasing, Inc.*, 45

A.D.3d 717, 718, 847 N.Y.S.2d 102, 105 (2d Dep't 2007) (whether plaintiff was aware of or should have been aware of a provision in defendant's contract with a third party is a factual issue that should not be determined on a pre-answer motion to dismiss).

IV. NONE OF PLAINTIFF'S CLAIMS IS TIME-BARRED

A. The Breach of Contract Claim is Timely

Under New York law, a breach of contract cause of action accrues, and the relevant six-year statute of limitations begins to run, at the time of the breach. N.Y. C.P.L.R. § 213(2); *Senter v. Gitlitz*, 97 A.D.3d 808, 808, 949 N.Y.S.2d 133, 133 (2d Dep't 2012); *6D Farm Corp v. Carr*, 63 A.D.3d 903, 906, 882 N.Y.S.2d 198, 201-202 (2d Dep't 2009). As detailed in the Complaint, which must be accepted as true, the breach occurred on October 21, 2013 when Hoefler, for the first time, reneged on his agreement to transfer half of the equity in HTF to Frere-Jones. (Compl. ¶ 42). The Complaint was filed on January 16, 2014, less than three months after the breach and well within the six-year statute of limitations.

B. The Promissory Estoppel Claim is Timely

The statute of limitations for a promissory estoppel claim is six years. N.Y. C.P.L.R. § 213(2); *Abdrabo v. N.Y.-Worker Compensation Bd.*, No. 03-Civ-7690, 2005 WL 1278539, at *2 (S.D.N.Y. May 27, 2005). The statute of limitations for promissory estoppel begins to run at the time the defendant breaks the alleged promise. *Id.* Here, as alleged in the Complaint, Hoefler broke his promise to Frere-Jones on October 21, 2013 when he, for the first time, told Frere-Jones that he would not transfer half of the equity in HTF. (Compl. ¶ 42). Frere-Jones's promissory estoppel claim is timely as Frere-Jones filed the Complaint well within the six-year statute of limitations.

C. The Constructive Trust Claim is Timely

"A claim for the imposition of a constructive trust is governed by the six-year statute of limitations found in CPLR 213(1) and begins to run at the time of the wrongful conduct or event giving rise to a duty of restitution." *Vitarelle v. Vitarelle*, 65 A.D.3d 1034, 1035, 885 N.Y.S.2d 320, 321 (2d Dep't 2009) (citation and quotations omitted); N.Y. C.P.L.R. § 213(1). Here, again as Frere-Jones alleged in his Complaint, Hoefler repeatedly acknowledged his obligation to transfer equity to Frere-Jones, but begged off purportedly due to the pressures of work and his personal life. (Compl. ¶ 29). Hoefler did not breach his promise to Frere-Jones until he, for the first time, refused to transfer 50% ownership of HTF on October 21, 2013. (Compl. ¶ 42). The duty of restitution did not arise until that time, and only a few months passed before this action was timely commenced.

In an analogous case, *Sitkowski v. Petzing*, 175 A.D.2d 801, 802, 572 N.Y.S.2d 930, 932 (2d Dep't 1991), plaintiff requested an imposition of a constructive trust where defendant breached his agreement to transfer to plaintiff a one-half interest in a home which defendant acquired in February 1982. In reliance on the promise, plaintiff allegedly borrowed money to pay for part of the contract to purchase the home. The plaintiff also alleged that defendant repeatedly postponed signing a deed of conveyance to her. Finally, in late summer of 1985, defendant directed plaintiff to leave the premises since he was the sole owner of the home. The Appellate Division held that the motion court erred in dismissing the claim for the imposition of a constructive trust because a question of fact exists with respect to "when the defendant allegedly breached the agreement by an identifiable, wrongful act demonstrating his refusal to convey a one-half interest in the property to the plaintiff." 175 A.D.2d at 802, 572 N.Y.S.2d at 932.

As previously noted, the court should deny the motion to dismiss because questions of fact cannot be properly determined on a pre-answer motion to dismiss. *Correa*, 84 A.D.3d at 651, 924 N.Y.S.2d at 337; *City Line Auto Mall, Inc.*, 45 A.D.3d at 178, 847 N.Y.S.2d at 105.

D. The Unjust Enrichment Claim is Timely

Under New York law, where unjust enrichment and breach of contract claims are based upon the same facts and pled in the alternative, a six-year statute of limitations applies. *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 584, 965 N.Y.S.2d 475, 477 (1st Dep't 2013). The statute of limitations "begins to run upon the occurrence of the wrongful act giving rise to a duty of restitution." *Golden Pac. Bancorp v. Fed. Deposit Ins. Corp.*, 273 F.3d 509, 520 (2d Cir. 2001) (citations and quotations omitted).

Frere-Jones's claim for unjust enrichment is timely for the same reasons as his other claims. As sufficiently alleged in Frere-Jones's Complaint, Hoefler did not break his promise to Frere-Jones until October 21, 2013, when Hoefler reneged on transferring half of HTF to Frere-Jones for the first time. (Compl. ¶ 42).

E. The Fraud Claim Is Timely

Fraud claims are subject to a statute of limitations of six years from the date of the commission of the fraud or two years from when the plaintiff discovered the fraud or, with reasonable diligence, could have discovered it. N.Y. C.P.L.R. § 213(8); *Emord*, 193 A.D.2d at 776, 598 N.Y.S.2d at 267; *Quadrozzi Contrete Corp.*, 56 A.D.2d at 353, 392 N.Y.S.2d at 690.

After Frere-Jones signed the two 2004 agreements, he repeatedly asked Hoefler to complete his deal. Hoefler's repeated statements that he would eventually complete their agreement and transfer equity to Frere-Jones would not have revealed any evidence of fraud to Frere-Jones. *CSAM Capital, Inc. v. Lauder*, 67 A.D.3d 149, 885 N.Y.S.2d 473, 479 (1st Dep't

2009) (letter containing non-fraudulent explanations for the alleged wrongful conduct suggests that reasonable diligence would not have revealed any evidence of fraud to the appellants at the time). Moreover, Frere-Jones's reliance on the repeated assurances of his partner and close friend is understandable and entirely reasonable. A jury could well find his failure to discover Hoefler's fraud earlier to have been reasonable. *See, e.g., Trepuk v. Frank*, 44 N.Y.2d 723, 724, 405 N.Y.S.2d 452, 453 (1978) (finding that "[r]eliance upon one's mother and fiduciary brother was understandable and the extraordinary delay in discovery is therefore equally understandable").

Ultimately, Hoefler cannot escape the fact that Frere-Jones has properly and sufficiently pled a cause of action for fraud within the statute of limitations. "It well may be that the evidence adduced upon a trial will not be sufficient to sustain the alleged fraud or, on the contrary, that it will be sufficient to establish that the plaintiffs had knowledge of the alleged fraud more than six years before this action was commenced, but on a motion of this kind [courts] do not pause to indulge in such speculations." *Quadrozzi Concrete Corp.*, 56 A.D.2d at 358, 392 N.Y.S.2d at 690.

V. GENERAL OBLIGATIONS LAW 17-101 IS INAPPLICABLE TO HOEFLER'S ORAL AGREEMENT

Hoefler's reliance on New York General Obligations Law § 17-101 is misplaced based on the allegations in this case. Section 17-101, which tolls the statutory period of limitation when there is a written acknowledgment of a debt, was enacted to modify "the common-law rule which recognized oral or written acknowledgments to perform previously *defaulted* contractual obligations." *Miwon, U.S.A., Inc. v. Crawford*, 629 F. Supp. 153, 156 (S.D.N.Y. 1985) (emphasis added) (citing *Scheuer v. Scheuer*, 308 N.Y. 447 (1955)).

Here, Frere-Jones alleges that Hoefler did not default on his contractual obligations until October 21, 2013. There was no need for a written acknowledgment to toll the statute of limitations because the statute of limitations has not yet run on any of Frere-Jones's causes of action.

Even assuming, *arguendo,* that the statute of limitations had run before Frere-Jones brought this Complaint, Frere-Jones's causes of action are nevertheless renewed because Hoefler had in fact "repeatedly acknowledged his obligation" to transfer half of the ownership in HTF in writing. (*See e.g.* Frere-Jones Aff. Ex. M).

An effective acknowledgment for the purposes of Section 17-101 may take a variety of forms as long as the acknowledgment recognizes the existing debt and is consistent with the party's intention to pay. *Banco Do Brasil S.A. v. Antigua & Barbuda*, 268 A.D.2d 75, 76, 707 N.Y.S.2d 151, 152 (1st Dep't 2000); *Faulkner v. Arista Records LLC*, 602 F. Supp. 2d 470, 478-479 (S.D.N.Y. 2009). The written acknowledgment does not need to specify the amount owed to effectively toll the statutory period. *Faulkner*, 602 F. Supp. 2d at 479.

In *Lincoln-Alliance Bank & Trust Co. v. Fisher*, the Appellate Division found the following vague expression to be acceptable: "Received your letter this morning and very sorry the condition of things both for yourself and myself. Shall be in within a few days to see you, but am sending Mr. Fisher's address on to you. . . . I wish you would write soon to him and enforce it very strongly that he must take care of it, or it will take all I have." 247 A.D. 465, 466, 286 N.Y.S. 722, 723 (4th Dep't 1936) (citation and quotation omitted).

There are a number of writings from Hoefler that acknowledge his existing debt to Frere-Jones that could be found to satisfy the requirements of Section 17-101. For example, on July 23, 2013, Hoefler instant messaged Frere-Jones acknowledging his obligation to transfer equity

in the company: "I'm going to have some things for you on the Bigger Stake in The Company conversation." (Frere-Jones Aff. Ex. M). Moreover, from the time that Frere-Jones and Hoefler first entered into their oral agreement in 1999 until Hoefler breached the agreement in 2013, Hoefler has, on multiple occasions, acknowledged his partnership with Frere-Jones in writing to both Frere-Jones as well as the general public. (Frere-Jones Aff. Exs. A-L). Such written acknowledgments are sufficient to toll the statute of limitations as they contain "a clear recognition of the claim as one presently existing." *Lincoln-Alliance Bank & Trust Co.*, 247 A.D. at 466, 286 N.Y.S. at 723-724. At minimum, the import of the writings involves a factual issue.

VI. EVEN IF THE APPLICABLE STATUTES OF LIMITATIONS HAVE RUN, DEFENDANT IS BARRED BY THE DOCTRINE OF EQUITABLE ESTOPPEL FROM RAISING THE STATUTE OF LIMITATIONS DEFENSE AS TO ALL CLAIMS

Even if all of Frere-Jones's claims accrued by March 2004, his claims should not be barred by the statute of limitations under the doctrine of equitable estoppel. Under New York law, equitable estoppel is applied to prevent a defendant from gaining an unconscionable advantage by bringing a statute of limitations defense where, as here, the defendant's representations or conduct were calculated to mislead plaintiff and plaintiff, in reliance thereon, failed to sue in time. *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-49, 406 N.Y.S.2d 259, 262 (1978) ("It is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action."); *Gen. Stencils v. Chiappa*, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337, 340 (1966) ("Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding."); *Robinson v. City of New* York, 24 A.D.2d 260, 263, 265 N.Y.S.2d 566,

570-572 (1st Dep't 1965) ("If the agreement, representations or conduct of the defendant were calculated to mislead the plaintiff, and the plaintiff in reliance thereon failed to sue in time, this is enough"); *Golden Budha Corp. v. Canadian Land Co. of Am., N.V.*, 931 F.2d 196, 200 (2d Cir. 1991); 75 N.Y. Jur. 2d Limitations and Laches § 56.

Hoefler should be equitably estopped from making a statute of limitations defense because (1) Hoefler misrepresented important facts – here, that Hoefler would get to it later; (2) Frere-Jones relied upon the misrepresentation – here, he continued to perform his part of the bargain; (3) Frere-Jones's reliance caused him to delay filing the lawsuit within the applicable limitations period; and, (4) as soon as Frere-Jones discovered Hoefler's true intent, he commenced the action "within a reasonable time after the facts giving rise to the estoppel have ceased to be operational." *Bild v. Konig*, No. 09-CV-5576, 2011 WL 666259, at *5 (E.D.N.Y. Feb. 14, 2011) (citations omitted).

In *Simcuski v. Saeli*, plaintiff brought a medical malpractice cause of action against defendant in August 1976 for damages that occurred during a surgery in October 1970. Although the statute of limitations for medical malpractice had run years ago, plaintiff's complaint alleged that defendant intentionally concealed the alleged malpractice from plaintiff and falsely assured her of effective treatment. As a result, plaintiff did not discover her injury until October 1974. Reviewing a motion to dismiss, the Court of Appeals found that plaintiff had sufficiently pled her complaint to bring it within the shelter of equitable estoppel. In particular, the court found that the "[t]he elements of reliance by plaintiff on the alleged misrepresentations as the cause of her failure sooner to institute the action for malpractice and of justification for such reliance, both necessarily to be established by her, [were] sufficiently pleaded within the fair intendment of the allegations of this complaint." 44 N.Y.2d at 446-452,

406 N.Y.S.2d at 262.

Similarly, here, Frere-Jones has pled sufficient facts to bring him within the doctrine of equitable estoppel. The Complaint alleges that in 1999, Hoefler made a deal with Frere-Jones that he would transfer 50% ownership in HTF in exchange for Frere-Jones's name, reputation, industry connections, design authority and the Dowry fonts. Up until October 2013, Hoefler continuously misrepresented to Frere-Jones that he intended to honor their deal, but that he needed some time due to personal and work pressures. Frere-Jones relied on his friend and business partner's representations and thus did not bring suit at that time. On October 21, 2013, Hoefler told Frere-Jones, for the first time, that he would not fulfill his end of the deal and transfer half of the equity in HTF to Frere-Jones. (Compl. ¶¶ 1, 13, 29, 35, 42). This action was brought soon after Hoefler finally admitted to Frere-Jones that he did not intend to transfer to Frere-Jones 50% of HTF as he had personally agreed. Hoefler is equitably estopped from taking advantage of any delay in suit resulting from his false representations and promises of 50% ownership of HTF to Frere-Jones.

VII. PLAINTIFF'S COMPLAINT PROPERLY PLEADS ALL CAUSES OF ACTION

Hoefler also cannot prevail on his arguments that Plaintiff fails to state a cause of action for each claim, albeit made in the most perfunctory manner.

A. Plaintiff's Breach of Contract Claim is Not Barred by the Parol Evidence Rule

Hoefler argues that his oral agreement to transfer half the equity in HTF to his partner, Frere-Jones, is barred by the parol evidence rule because it varies from the terms of the two 2004 agreements. That argument fails because Hoefler is not a party to either of the 2004 agreements. *Bell v. Liberty Drug Co.*, 16 A.D.2d 809, 810, 228 N.Y.S.2d 846, 849 (2d Dep't 1962). In the absence of definite and clear language in the documents to the effect that Hoefler was intended to

be benefited by them, the rule precluding parol evidence is not available to Hoefler. *Bush Homes, Inc. v. Franklin Nat'l Bank*, 24 A.D.2d 1012, 1013, 266 N.Y.S.2d 89, 91 (2d Dep't 1965). Notably, all of the cases Hoefler cites in support of his argument are distinguishable as they involve the existence of a written agreement between both of the parties. *See, e.g., Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 A.D.3d 614, 878 N.Y.S.2d 717 (1st Dep't 2009) (written agreement between plaintiff and defendant partners of the defendant law firm); *SAA-A, Inc. v. Morgan Stanley Dean Witter & Co.*, 281 A.D.2d 201, 721 N.Y.S.2d 640 (1st Dep't 2001) (contract between plaintiff and defendant); *N.Y. Fruit Auction Corp. v. City of New York.*, 81 A.D.2d 159, 439 N.Y.S.2d 648 (1st Dep't 1981) (lease agreement between plaintiff and defendant); *Johnson v. Stanfield Capital Partners, LLC*, 68 A.d.3d 628, 891 N.Y.S.2d 383 (1st Dep't 2009) (employment agreement between the plaintiff and defendant LLC); *Namad v. Salomon Inc.*, 74 N.Y.2d 751, 545 N.Y.S.2d 79 (1989) (employment agreement between the parties); *Stone v. Schulz*, 231 A.D.2d 707, 647 N.Y.S.2d 822 (1996) (employment agreement between the parties); *Smith v. Felissimo Universal*, No. 151491, 2013 WL 6735767 (Sup¶. Ct. N.Y. Cnty. July 30, 2013) (employment agreement between plaintiff and defendant).

There is no question that Frere-Jones has clearly alleged all of the essential elements of breach of contract. In his Complaint, Frere-Jones alleges that 1) Hoefler and Frere-Jones "entered into an oral contract" where Hoefler promised to transfer 50% ownership of HTF to Frere-Jones in exchange for Frere-Jones's Dowry Fonts, resignation from Font Bureau, relocation to New York, and contribution of his name, reputation, industry connections and design authority to HTF; 2) Frere-Jones completely performed under the oral contract; 3) Hoefler breached his agreement by refusing to transfer 50% ownership in HTF in breach of the oral contract; and 4) Frere-Jones was damaged as a result of Hoefler's breach. (Compl. ¶¶ 45-49).

Accordingly, the motion to dismiss the cause of action for breach of contract should be denied. *See, e.g,. Red Oak Fund, L.P. v. MacKenzie Partners, Inc.*, 90 A.D.3d 527, 528, 934 N.Y.S.2d 401, 402 (1st Dep't 2011) (affirming denial of motion to dismiss where plaintiff sufficiently pleaded a breach of contract claim) *Elisa Dreier Reporting Corp. v. Global Naps Networks, Inc.*, 84 A.D.3d 122, 126, 921 N.Y.S.2d 329, 333 (2d Dep't 2011) (denying defendant's motion to dismiss breach of contract claim where plaintiff sufficiently stated a cause of action for breach of contract by alleging all of the essential elements); *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 803, 893 N.Y.S.2d 237, 239 (2d Dep't 2010) (same).

B. Plaintiff is Not Precluded from Recovering on His Claims of Promissory Estoppel, Constructive Trust, and Unjust Enrichment

Hoefler's argument on the three quasi-contract claims is essentially that the two 2004 agreements govern the relationship between Frere-Jones and himself. First, of course, Hoefler is not a party to either of the two agreements – despite his disingenuous claims to the contrary. The 2004 agreements do not govern the issue of equity in HTF.

In *Joseph Sternberg, Inc. v. Walber 36th Street Associates,* plaintiff, a licensed real estate brokerage firm brought action against defendant vendor seeking recovery of commission based upon breach of contract and the quasi-contract theory of quantum meruit. 187 A.D.2d 225, 226, 594 N.Y.S.2d 144, 145 (1st Dep't 1993). Plaintiff negotiated an agreement for the sale of defendant's commercial property, whereby the buyer (a third-party defendant) would purchase the premises for $11.5 million with a $450,000 commission to be paid by defendant. Plaintiff was excluded from further negotiations and ultimately, the sale was concluded for a reduced price of $10.6 million with plaintiff being paid no commission whatsoever. The First Department found that the trial court erred in holding that the contract at issue barred recovery of a commission on a theory of quantum meruit by construing the contract to have governed the

issue of commission. In its decision, the First Department distinguished *Clark–Fitzpatrick, Inc. v. Long Island Railroad Co.*, 70 N.Y.2d 382, 521 N.Y.S.2d 653 (1987), a case on which Hoefler also relies in support of his argument, stating that the contract at issue was silent as to plaintiff's entitlement to a commission in the event a sale of the building occurred for a lesser price. The First Department further noted that New York law has never held that "a claim in contract and one in quasi contract are mutually exclusive in all events and under all circumstances." *Joseph Sternberg, Inc.*, 187 A.D.2d at 226, 594 N.Y.S.2d at 145-46.

In the same way, the fact that the 2004 agreements are silent on Hoefler's promise to transfer equity even though they call for Frere-Jones to provide services, the contribution of his name, and his assignment of fonts to HTF, does not support the conclusion that the 2004 agreements fully govern the issue of equity. Here, upon the pleadings which are accepted as true, it can be reasonably inferred from Frere-Jones's allegations that the equity terms were not meant to be governed by the Sale and Assignment of Type Fonts or the Employment Agreement. It is equally reasonable to infer that the oral agreement between Hoefler and Frere-Jones properly governs the issue of equity in this case. Thus, since the 2004 agreements do not fully govern the subject matter of the parties' dispute, Frere-Jones may properly plead his quasi-contract causes of action in the alternative. *Joseph Sternberg, Inc.*, 187 A.D.2d at 228, 594 N.Y.S.2d at 146.

Lastly, Frere-Jones may plead both his breach of contract and his quasi-contract claims because Hoefler disputes the existence of the contract sued upon. *Curtis Props. Corp. v. Greif Cos.*, 236 A.D.2d 237, 239, 653 N.Y.S.2d 569, 571 (1st Dep't 1997); *Gordon v. Oster*, 36 A.D.3d 525, 829 N.Y.S.2d 49, 50 (1st Dep't 2007); *R.D. Weis & Co. v. The Children's Place Retail Stores, Inc.*, No. 08 Civ. 4245, 2008 WL 4950962, at *4 (S.D.N.Y. Nov. 19, 2008) (plaintiff properly pleaded its quasi-contract claim as an alternative ground of relief where the

validity and enforceability of the express Written Contract is in dispute).

C. Plaintiff's Fraud Claim is Not Duplicative of His Contract Claim and May Also Be Asserted in the Alternative

Hoefler's argument that Frere-Jones's fraud claim is duplicative of the breach of contract claim is unavailing. Under New York law, contract and fraud claims may co-exist where, as here, the defendant has a fiduciary duty to the plaintiff. *See Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2d Cir. 1996).

When, as with Hoefler's promise that he and Frere-Jones would be equal owners and partners, there is a relationship of trust and confidence between the parties, "then a fiduciary duty arises from the contract which is independent of the contractual obligation." *GLM Corp. v. Klein*, 665 F. Supp. 283, 286 (S.D.N.Y. 1987). "Consequently, an action for fraud will lie, notwithstanding that the breached fiduciary duty arose from the contract establishing the fiduciary relationship." *Id.* Frere-Jones's Complaint alleges that Hoefler owed fiduciary duties to Frere-Jones by virtue of their being business partners. (See Compl. ¶ 58); *Le Bel v. Donovan*, 96 A.D.3d 415, 417, 945 N.Y.S.2d 669, 671 (1st Dep't 2012) ("Under New York law, partners owe each other a fiduciary duty"). Since Hoefler's fiduciary duty to Frere-Jones is separate from his duty to perform under his oral agreement to transfer a 50% share in HTF to Frere-Jones, his fraud claims are not duplicative of his breach of contract claims.

Finally, during the motion to dismiss stage, Frere-Jones is permitted to plead contract and fraud in the alternative. *Citi Mgmt. Grp., Ltd. v. Highbridge House Ogden, LLC*, 45 A.D.3d 487, 847 N.Y.S.2d 33, 34 (2007).

CONCLUSION

Hoefler's motion to dismiss the complaint should be denied in its entirety.

Dated: New York, New York
April 4, 2014

HOGUET NEWMAN
REGAL & KENNEY LLP

By: _____

Fredric S. Newman
Kerin P. Lin
10 East 40th Street
New York, NY 10016
(212) 689-8808
Attorneys for Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER

Defendant.

Index No. 650139/2014

AFFIDAVIT OF PLAINTIFF TOBIAS FRERE-JONES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

STATE OF NEW YORK)
) ss:
NEW YORK COUNTY)

TOBIAS FRERE-JONES, being duly sworn, deposes and says:

1. I am the Plaintiff in this case. I reside in Brooklyn, New York. I make this affidavit in opposition to Defendant Jonathan Hoefler's motion to dismiss based upon documentary evidence and other reasons.

Background

2. I first met Jonathan in the 1990s while I was working at Font Bureau in Boston and Jonathan was at his company, The Hoefler Type Foundry ("HTF") in New York. We got to know each other, first as competitors, and then as collaborators. Soon enough, we became close friends.

3. In the Summer of 1999, Hoefler approached me about working together, humorously suggesting the name "Tobias and Jonathan's Excellent Adventure (LLC)." When we met one night at the Gotham Bar and Grill in Manhattan, he made a formal 50-50 partnership proposal, to which I subsequently agreed later that Summer.

4. We agreed that I would move to New York and join HTF, contribute my name, reputation, industry connections, design authority, and a group of fonts we came to call the "Dowry Fonts," which I believe had a value in excess of $3 million, in exchange for half of Jonathan's shares in HTF and my name on the door.
5. We agreed that HTF would be run with me as the principal designer and Jonathan as responsible for running the business side of the company, using his "client-hustling skills" to sell my font designs. As my close friend and business partner, I trusted Jonathan with the business and legal side of our deal.
6. I never would have left Font Bureau and Boston, where I was well-established, merely to work for HTF as an employee.
7. Soon after I joined HTF, Jonathan began promoting our partnership to industry and media contacts, current clients and potential clients.
8. Until October 21, 2013, Jonathan continued to represent me as his equal business partner both to me and to the public. For example, Jonathan had always represented that we drew the same salary and received the same percentage of contributions into our retirement accounts, and in an unrelated litigation, Jonathan valued us as equals.

Documentary Evidence

9. The following collection of emails I quote with references underlined and attach to this affidavit are just a few examples of the hundreds, maybe even thousands, of instances in which Jonathan described or presented me as his partner. The full body of Jonathan's written communications is on HTF's computers and servers.
    a. On February 15, 2000, Jonathan wrote to a potential client: "we're not accepting any new commissions until the first of April; my new (and still as-yet-

unannounced) partnership with Tobias Frere-Jones has opened the floodgates for new work." A true and correct copy of this email is attached as Exhibit A.

b. On February 23, 2000, Jonathan wrote to a potential client at Sephora, "I was in the process of setting up my new partnership with Tobias Frere-Jones (you know his Interstate family, among others) – news of our collaboration seems to be spreading fast . . . ." A true and correct copy of this email is attached as Exhibit B.

c. On July 14, 2000, Jonathan wrote to a client at Conde Nast regarding a typeface "that Tobias Frere-Jones, my partner at the studio, has been noodling with for some time." A true and correct copy of this email is attached as Exhibit C.

d. On April 30, 2002, Jonathan sought my help to respond to an inquiry from the editor of Graphis, a publisher, who wanted information about us for an article focusing "on the new venue/partnership he [Jonathan] has developed with Frere-Jones." A true and correct copy of this email is attached as Exhibit D.

e. On October 2, 2002, as part of his pitch to land Ford as a client for custom design work, Jonathan acknowledged that "[s]ince 1999, Tobias has been a partner at The Hoefler Type Foundry." A true and correct copy of an excerpt from this email is attached as Exhibit E.

f. On August 8, 2012, Jonathan emailed a prospective client at the Smithsonian Institute, thanking her for her time and apologizing on my behalf: "My partner Tobias Frere-Jones (the Frere-Jones in "Hoefler & Frere-Jones") asked me to send his apologies for missing the call – he was called away at the last minute." A true and correct copy of this email is attached as Exhibit F.

g. In addition, on a regular basis, Jonathan called me his business partner in all forms of communication with me, including in writing and to my face. For example, on March 17, 2000, we agreed to take a break "for a game of Immolate-Your-Business-Partner." A true and correct copy of this email is attached as Exhibit G.

h. As another example, on May 20, 2002, Jonathan emailed me with a subject line that read "[i]t's possible that your partner is a genius." A true and correct copy of this email is attached as Exhibit H.

i. Furthermore, whenever Jonathan received interview requests, he would usually schedule the interviews to include me. For example, on October 18, 2005, in response to an interview request, Jonathan replied, "[m]y partner Tobias Frere-Jones has been kind enough to let me shanghai him into joining us, since we're far more fun as a tag team effort." A true and correct copy of this email is attached as Exhibit I.

j. As another example, on January 4, 2006, a magazine asked to interview Jonathan. In response, Jonathan said, "I usually do these things in the company of Tobias Frere-Jones, my partner at the studio; presumably there's room for us both?" A true and correct copy of this email is attached as Exhibit J.

k. Even the New York Times reported that we were partners. In an October 19, 2004 article, the New York Times wrote: "With so many parallels in their adolescence, it seems inevitable that Mr. Hoefler and Mr. Frere-Jones would become business partners." A true and correct copy of the New York Times article is attached as Exhibit K.

10. Never, in any of Jonathan's communications, did he deny that we were equal partners in the ownership and operation of HTF, nor did he correct the public or internal perception of equality.

11. From the beginning of our venture until 2004, Jonathan and I repeatedly discussed completing our original deal and began to focus on rebranding HTF as "Hoefler & Frere-Jones," to reflect my equal position.

12. In June 2003, a public relations consultant was hired to implement the name change. The consultant drafted the following press release on August 24, 2003:

> "Jonathan Hoefler, Principal of The Hoefler Type Foundry, and Tobias Frere-Jones, Type Director of The Hoefler Type Foundry, announced today that they have entered into an agreement to become equal partners and to rename the business Hoefler & Frere-Jones Typography."

A true and correct copy of an excerpt of this draft is attached as Exhibit L.

13. Between 1999 and March 2004, I continued to perform my part of the agreement, including by negotiating with Font Bureau to obtain the rights to the Dowry Fonts, which I acquired in November 2002.

14. In January 2004, Jonathan and HTF's attorney Frank Martinez presented me with a Sale and Assignment of Type Fonts that transferred the Dowry Fonts to HTF for nominal consideration. I was not separately represented by counsel when I signed the agreement because I trusted Jonathan with handling the business and legal part of our deal. I believe that the Dowry Fonts had a value of over $3 million but the sale price for the Dowry Fonts was ten dollars. I considered signing the document a ministerial act and part of my performance of our original partnership agreement. I never would have transferred the Dowry Fonts to HTF but for Jonathan's promise to transfer to me half of the ownership of HTF.

15. I executed the Sale and Assignment of Type Fonts as well as an Employment Agreement with HTF, because I believed that there would be an additional agreement between Jonathan and me regarding the transfer of equity once he got around to it. At that time, I still trusted him.

16. After I signed the Sale and Assignment of Type Fonts, I repeatedly asked Jonathan to complete his part of the bargain and transfer half of his shares in HTF to me. Jonathan would always acknowledge his obligation to do so, but would beg off for a variety of reasons, such as work and personal pressures. As his friend and partner, I respected his wishes.

17. In the Spring of 2012, Jonathan promised that he would complete the deal after the launch of the Cloud, a new HTF service to deliver HTF fonts for use in website design. When the Cloud finally launched on July 1, 2013, I asked Jonathan to set a date to complete our deal as Jonathan had always promised. Jonathan set this date for July 31, 2013.

18. On July 23, 2013, Jonathan and I had an instant message conversation in which he said that in advance of our July 31, 2013 meeting, "I'm going to have some things for you on the Bigger Stake in the Company conversation." A true and correct copy of an excerpt of this instant message conversation is attached as Exhibit M.

19. On July 31, 2013, I followed up with Jonathan, and he curtly responded: "Stop it. I'm working on it. Stop harassing me."

20. After being told, yet again, that he needed more time, finally, on October 21, 2013, Jonathan told me, for the first time, that he did not intend to transfer 50% of HTF to me. Instead, I discovered that he had transferred shares intended for me to his wife and HTF

Chief Operating Officer Carleen Borsella. Now, Jonathan and Carleen are the owners of 100% of HTF.

21. If I had known before October 21, 2013 that Jonathan did not intend to honor his agreement to transfer 50% ownership in HTF to me as he promised, I would have brought this action earlier instead of forbearing in reliance upon his promises that he would get to it later.

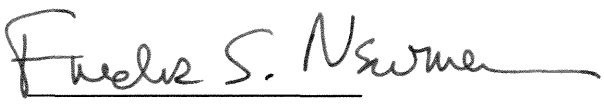
22. On January 17, 2014, the day after my complaint was filed in this court, HTF released a press release stating the following: "With Tobias's departure, the company founded by Jonathan Hoefler in 1989 will become known as Hoefler & Co." Attached hereto as Exhibit N is a true and correct copy of HTF's press release announcing my departure.

23. For the reasons set forth above, I respectfully request that Jonathan Hoefler's motion to dismiss this action be denied.

Tobias Frere-Jones

Sworn to before me this

4th day of April, 2014



Notary Public

FREDRIC S. NEWMAN
Notary Public, State of New York
No. 02NE5072568
Qualified in New York County
Commission Expires February 3, 2015

From: **Jonathan Hoefler** hoefler@typography.com
Subject: RE: Notice
Date: February 15, 2000 at 4:29 PM
To: Phil Bratter phil_bratter@Worth.com

Hi Phil,

Congraulations on the move. I hope it's a sign of continued success!

I have to be out this week to deal with a family emergency, but perhaps next week we can talk shop. I warn you, though: we're not accepting any new commissions until the first of April; my new (and still as-yet-unannounced) partnership with Tobias Frere-Jones has opened the floodgates for new work. However, if you're interested in planning for the fall, I hope we'll have the chance to work together.

Regards,

J

ps Send me your new info -- I want to make sure you get our next catalog!

> Hey. I've got news! I'm leaving Worth mag and going to George. I'm really excited but I'm also nervous. They want a redesign, fonts and all in three weeks! That's where you come in...of course. I am looking for new body font plus a sans serif display family. right now they use Interstate which isn't bad but they use some god awful cut of Century Schoolbook for body text. I would like to find a body font that's a bit more progressive and less classic. any thoughts? I also have to redraw the logo and would like you to work on it. that is if you are still doing that type of stuff. gotta go to a meeting. please call me to discuss. I'll be at worth till Friday 212.230.0251. Please call as soon as you can.
> Thanks, Phil
>
> > ----------
> > From: Jonathan Hoefler
> > Sent: Tuesday, February 15, 2000 12:19 PM
> > To: HTF Info
> > Cc: Tobias Frere-Jones
> > Subject: Notice
> >
> > I'm going to be out of the office this week. If you need to reach me, I'll be e-mailable as always at <hoefler@typography.com>, and I'll be checking my voicemail as well; if it's urgent, you can speak with Megan Hackett at 212 777 6640 x201. Sorry for the brisk notice -- I'll give you a call when I'm back.
> >
> > Yours,
> >
> > Jonathan

From: **Jonathan Hoefler** hoefler@typography.com
Subject: Re: Claudia Franzen new contact info
Date: February 23, 2000 at 12:47 AM
To: Claudia Franzen claudia@sephora-creative.com
Cc: Megan Hackett hackett@typography.com, Tobias Frere-Jones frere-jones@typography.com

Dear Claudia,

Congratulations on the move! You and Sephora seem like a natural partnership, and I look forward immensely to seeing what you do there.

I'm out of the office this week, dealing with a family emergency; I'm expected back by the end of the week, so perhaps we can talk then. In brief, though (because I'd be DELIGHTED to work with you on Sephora) new fonts are typically between $10,000 and $25,000 each, depending on what we decide to do (the big issues are licensing, exclusivity, embedding, etc.; let's talk about these.)

The key ingredient, though, is time: we're fully committed until at least April right now. I think when we last spoke, I was in the process of setting up my new partnership with Tobias Frere-Jones (you know his Interstate family, among others) -- news of our collaboration seems to be spreading fast, as we're already setting up projects for the end of the summer and the early fall. So let's see if we can talk sooner rather than later: March is open for me, save the week of the 13th.

Again, great to hear the good news. Hope you're doing well & talk to you soon!

xxx
J

From: **Jonathan Hoefler** hoefler@typography.com
Subject: Font Prospect
Date: July 14, 2000 at 8:09 PM
To: jmadara@condenast.com

Dear Jennifer,

Sorry this is so late coming!

This is a typeface that Tobias Frere-Jones, my partner at the studio, has been noodling with for some time. It's modeled on the work of Alexander Phemister, an Scottish punchcutter working in the United States late in the last century. It's noteworthy for being pretty far removed from other things -- the closest approximation in off-the-rack typefaces, I suppose, is Century Old Style, though I think you'd agree that it's really a far cry from that. Anyway, I thought it might be appropriate as it has the sort of relaxed, comfortable elegance that has always informed House & Garden. I look forward to hearing your thoughts!

If I can unearth anything else in the archives that might fit the bill, I'll bring it along on Monday. In the meantime, please let me know if you have any questions, or if there is anything I have neglected to include -- I'm likely to be in over the weekend, and you can reach me directly at 777 6640 x202. I look forward to meeting you on Monday.

Kindest Regards,

Jonathan Hoefler

This message has the following attachments:
file://localhost/Users/tobiasfrerejones/Library/Mail/Attachments/172.gif

From: **Jonathan Hoefler** hoefler@typography.com
Subject: Fwd: Gotham comments; and Graphis profile
Date: April 30, 2002 at 9:01 AM
To: Tobias Frere-Jones frere-jones@typography.com

Help needed pdq

---------- Begin Forwarded Message ----------
Date: 4/30/02 6:24 AM
Received: 4/30/02 8:50 AM
From: John D. Berry, typographer@earthlink.net
To: Jonathan Hoefler, hoefler@typography.com

Jonathan --

I discovered, as we were putting the finishing touches on Language Culture Type, that Jesse hadn't sent me comments on either Gotham or Retina. ("To come soon": but they didn't.) I managed to put together something on Retina, from the text on your site, but I couldn't find anything about Gotham. If you could give me 90-95 words max. on the design, first thing in the morning (your time), that would be great. Otherwise, there'll be a blank in the comments section on that typeface.

We're shipping the book to Graphis, the publisher, tomorrow. It's been a push, the last few days.

Speaking of Graphis, they do want me to do that article on you and Tobias. By the middle of May. So as soon as we put this monster book to bed, I'll be bugging you for brilliant bons mots and background information. Here's what Laetitia, the editor, said about what she wants:

> I think the article should focus on the new venue/partnership he has developed with Frere-Jones. The article should address issues proper to the profession of type designer, how faces are designed/distributed/sold, the business aspect of it, as well as the discoveries and hurdles of their applications (magazine, corporate logos, etc).
> Of course some biographical information about the 2 men should be tied in the text, but for that type of article, I think we are looking mostly for insights about their aesthetic approach as well as the industry aspect.

I've got all the stuff you gave me last time I saw you, of course. Haven't had a moment to think more deeply about it, but later this week, I will.

John

:: :: :: :: ::

John D. Berry
232 Winfield Street
San Francisco CA 94110

+1 (415) 206-9306
+1 (415) 826-1527 (fax)
+1 (415) 203-9306 (mobile)

dot-font:
http://www.creativepro.com/author/home/951.html

---------- End Forwarded Message ----------

From: **Jonathan Hoefler** hoefler@typography.com
Subject: Ford typeface
Date: October 2, 2002 at 12:03 AM
To: Nick Clark nick@thepartners.co.uk, Nigel Davies nigel@thepartners.co.uk, Gillian Thomas gt@thepartners.co.uk
Cc: Jane Hughes jane@thepartners.co.uk, Robert Valentine robert@valentinegroup.com, jeff@chicsimple.com, Tobias Frere-Jones frere-jones@typography.com, Carleen Borsella borsella@typography.com

Dear Nick,

I'm glad we got to meet last week to talk in person about the project for Ford. Thanks for taking the time to get together.

When my studio is approached by a client who's attached to an existing typeface, I often take the unpopular position that they should simply stick with it. The person who loves Bodoni should use Bodoni: anything else will only be a disappointment. All things being equal, I'd encourage Ford to use Interstate. It's a great typeface.

But for an organization, choosing a typeface isn't simply a matter of finding something you like. A typeface is an integral part of a brand's identity; it is an asset to be managed, and an investment to be defended. In your conversations with Ford, I'd encourage you to couch the discussion in these more practical terms. Following are some talking points that may prove useful.

Background

Interstate is an adaptation of the Highway Gothic typeface used for American highway signage. It was designed by Tobias Frere-Jones for Font Bureau in the early nineties, and was released in 1994. In the eight years since its debut, it has enjoyed both critical and popular success, becoming one of the most prevalent typefaces of the past decade.

Since 1999, Tobias has been a partner at The Hoefler Type Foundry. Should this project come to fruition, he will be the creative lead on the typeface.

Exclusivity

The most compelling reason not to use any typeface that's widely available is that it's widely available. From a branding perspective, it simply doesn't make sense to let anyone forge your corporate handwriting. Put more succinctly, Interstate is Chrysler's corporate typeface, too. See www.chrysler.com.

Convenience

Typefaces are intellectual properties which are licensed by their manufacturers, usually on a per-computer basis. Interstate, for example, is the property of Font Bureau, Inc. The Interstate family, which retails for $800, is made available through a network of fifteen authorized distributors in nine countries.

When buying a retail font, it is the responsibility of the consumer to audit the font's installation and use, to ensure that its use complies with the terms of the its End-User License Agreement. In industries that use many typefaces, such as publishing, it's common for an organization to appoint a "font ombudsman" who works in asset management. (Presumably Ford does not have this luxury, nor should it need to.)

A new typeface commissioned by Ford would be theirs to use without restriction. Ford and its agents would be entitled to use the fonts for essentially any purpose that directly names and benefits Ford Motors. The development fee will absorb any "back-end" licensing issues: there will

From: **Jonathan Hoefler** hoefler@typography.com
Subject: Thanks
Date: August 8, 2012 at 4:48 PM
To: Baumann, Caroline Baumannc@si.edu, Jennifer Northrop NorthropJ@si.edu
Cc: Tobias Frere-Jones frere-jones@typography.com

Dear Caroline,

Thanks for taking the time to talk just now. My partner Tobias Frere-Jones (the Frere-Jones in "Hoefler & Frere-Jones") asked me to send his apologies for missing the call — he was called away at the last minute.

I hope you'll keep me posted as the project develops. As I mentioned, H&FJ has worked with Michael's team at Pentagram a number of times, and I can't think of a designer who's better able to create thoughtful and original solutions. But we'd be pleased to talk to whomever you select for the project.

I look forward to speaking you soon, and hope that we'll have a chance to see each other again at the National Design Awards.

Kindest Regards,

Jonathan Hoefler

. . . . . .

Jonathan Hoefler
Hoefler & Frere-Jones, Inc.
http://www.typography.com

611 Broadway, Room 725
New York, NY 10012-2608
Tel. 212 777 6640

From: **Jonathan Hoefler** hoefler@typography.com
Subject: Re: brobdingnagian rodomontade
Date: March 17, 2000 at 4:43 PM
To: Tobias Frere-Jones frere-jones@typography.com

> *which reminds me, are you around later for a game of Immolate-Your-Business-Partner?

YES

From: **Jonathan Hoefler** hoefler@typography.com
Subject: It's possible that your partner is a genius
Date: May 20, 2002 at 1:27 PM
To: Tobias Frere-Jones frere-jones@typography.com

I had a BRAINSTORM this weekend about that exhibit of type specimen books I thought it might be fun to put on... Can't wait to tell you about it tomorrow.

J

Jonathan Hoefler
The Hoefler Type Foundry, Inc.
www.typography.com

611 Broadway, Room 608 212 777 6640 x202
New York, NY 10012-2608 212 777 6684 (fax)

From: **Jonathan Hoefler** hoefler@typography.com
Subject: Re: A request to be a guest on Design Matters
Date: October 18, 2005 at 12:02 PM
To: Debbie Millman debbie.m@sterlingbrands.com
Cc: Tobias Frere-Jones frere-jones@typography.com

Hi Debbie,

Nice to meet you. I wonder whether we might have met at last year's Cooper Hewitt thing? At any rate, I see that we're both at the same table this year, so one way or another we'll meet on Thursday!

Thanks for asking me to take part in the show -- I'd be delighted. My partner Tobias Frere-Jones has been kind enough to let me shanghai him into joining us, since we're far more fun as a tag-team effort. I'm going to be away from 18-25 February, and Tobias is planning a trip sometime in February as well, so late January might work best for us. Perhaps we can set aside some time between now and then to plan for some of the things that you'd like to talk about.

See you soon!

Kindest Regards,

Jonathan

> Hello Jonathan--
>
> Please let me introduce myself: I am Debbie Millman. I work at a company called Sterling (www.sterlingbrands.com); I am a writer for the design blog Speak Up (www.underconsideration.com/speakup) and Print Magazine (www.printmag.com), and I am a board member of the New York Chapter of the American Institute of Graphic Arts (www.aigany.org).
>
> I also host a live weekly talk show on the internet called "Design Matters with Debbie Millman" on the Voice America Business Network. It can be found here:
>
> http://www.business.voiceamerica.com/ez/index.php/plain/business/meet_our_hosts/debbie_millman?eZSESSIDplain=4a8a2418de5061ee143be33c06ce49b6/
>
> VoiceAmerica is the industry leader in Internet talk radio, and Design Matters is has about 140,000 listeners. We were also voted a "favorite podcast" on IF's Marketing Podcast survey at www.if.psfk.com, and have just recently become available as Podcasts on iTunes.
>
> I am beginning my third season in January; my first two seasons included the following wonderful and inspiring guests: Cheryl Swanson, Sean Adams, Michael Bierut, Nicholas Blechman, Eames Demetrios, Andrew Geller, Alexander Gelman, Milton Glaser, Steve Heller, Grant McCracken, Noreen Morioka, Emily Oberman, Virginia Postrel, Rick Poyner, Stefan Sagmeister, Paula Scher, James Victore and Andrew Zolli
>
> It has been a great journey thus far, and I am writing to see if you might be interested in appearing on the show for a live one hour interview sometime between January 13th 2006 and the end of March. The show is scheduled every Friday afternoon, from 3-4PM ET and you can either be here with me in my office in NYC--where it is recorded, or you can participate via phone. It is entirely up to you. The show would be about your thoughts, ideas and philosophies expressed in your extraordinary work.
>
> It would be an honor to have you on the show--please let me know if you are interested.

Thank you!
-debbie

debbie millman
president, design
sterling brands
empire state building
new york new york 10118
tel 212 329 4609 fax 212 329 4700 cell 917 880 6327
www.sterlingbrands.com

Jonathan Hoefler
Hoefler & Frere-Jones
http://www.typography.com

611 Broadway, Room 725 212 777 6640 x202
New York, NY 10012-2608 212 777 6684 (fax)

From: **Jonathan Hoefler** hoefler@typography.com
Subject: Re: American Artist Drawing mag
Date: January 4, 2006 at 7:06 PM
To: Robert Bahr RBahr@vnubuspubs.com
Cc: Tobias Frere-Jones frere-jones@typography.com, Carleen Borsella borsella@typography.com

Dear Mr. Bahr,

I'm sorry to be so long getting back to you -- I am at last back, and I think somewhat recovered from the holidays.

I'd be delighted to be interviewed for the magazine. I usually do these things in the company of Tobias Frere-Jones, my partner at the studio; presumably there's room for us both? If there's a time that's convenient to meet, let me know: I'm generally open next week, with the exception of Tuesday morning and Thursday throughout the day. (Conveniently, I see that we're just down the street from you, at 611 Broadway.)

In the meantime, I'd be happy to send you some background information about the two of us, if you think it would be useful.

Kindest Regards,

Jonathan Hoefler

Jonathan Hoefler
Hoefler & Frere-Jones, Inc.
http://www.typography.com

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The New York Times
nytimes.com

October 19, 2004

PUBLIC LIVES

2 Type Designers, Joining Forces and Faces

By DAVID W. DUNLAP

FOR young Jonathan Hoefler, it was cans of treacle and boxes of custard mix in his mother's kitchen on the Upper West Side. For young Tobias Frere-Jones, it was jars of marmalade and pots of mustard in his mother's kitchen in Brooklyn. For both, it was the realization that something about the type on those labels (Gill Sans, they later learned) marked the food, with no other cues needed, as indubitably English.

And so, two type designers were born.

Six days apart, as it happened: Jonathan on Aug. 22, 1970, Tobias on Aug. 28. Both had English mothers - Doreen Benjamin from Yorkshire, married to Charles Hoefler; and Elizabeth Frere from Kent, married to Robin Jones - who bought imported groceries that stoked their sons' fascination with letter forms unlike any they were accustomed to seeing in the United States.

(Thirty years ago, before the advent of computer typography, national fonts often stayed within national borders. Gill Sans, a utilitarian English typeface, was designed in 1928 by Eric Gill along the lines of that used in the London Underground.)

With so many parallels in their adolescence, it seems inevitable that Mr. Hoefler and Mr. Frere-Jones would become business partners. But fate kept them apart for a while.

Mr. Frere-Jones's father brought home layout boards for advertising campaigns on which he was working. His mother brought home printing samples from her job. And there were framed pages from 15th-century books on the walls.

"I got the idea that somebody, somewhere, has the job of deciding what these letters look like," Mr. Frere-Jones said. "It was like someone was designing water or designing air."

He graduated from the Rhode Island School of Design in 1992 and moved to Boston, where he worked at the Font Bureau, a digital type foundry. Among the fonts he designed in the early 1990's was Interstate, based on federal highway signs.

In 1997 Mr. Frere-Jones learned from a catalog that an extremely rare lot of materials from the celebrated German type foundry, D. Stempel, was for sale, including an enormous 70-year-old specimen book. He jumped at the chance to buy the lot.

Mr. Hoefler's father was a theatrical set designer and producer of industrial shows, which meant that there were always sheets of rub-off lettering around the house. His first type book was the 1977 catalog for Letraset transfer sheets.

"Tobias and I were probably the only two people under 14 who subscribed to U&lc," Mr. Hoefler said, referring to a magazine, Upper & Lower Case, published by the International Typeface Corporation.

Rather than going to college, he founded the Hoefler Type Foundry in 1989 and quickly won a commission from Sports Illustrated, which led to a face called Champion Gothic, inspired by 19th-century wood type. He has also designed fonts for The New York Times Magazine, among other clients.

In 1997, Mr. Hoefler learned from a catalog that an extremely rare lot of materials from the celebrated German type foundry, D. Stempel, was for sale, including an enormous 70-year-old specimen book. He jumped at the chance to buy the lot, only to discover that Mr. Frere-Jones had beaten him to it.

This was not the first time their paths had crossed competitively in search of books. It began to dawn on both men, who admired each other's work, that combining forces - and libraries - might make sense. "The whole thing had taken on the tone of an arms race," Mr. Hoefler said. "It was financially ruinous for us both."

Mr. Frere-Jones joined the Hoefler Type Foundry in 1999. The name of the firm was changed this year to Hoefler & Frere-Jones. Five people now work there, in the Cable Building at Broadway and Houston Street. Mr. Hoefler is married to Carleen Borsella, the firm's marketing director and chief operating officer.

Though the spotlight does not often shine on typographers, the firm received wide attention this summer for its Gotham font, designed by Mr. Frere-Jones, which was used on the Freedom Tower cornerstone. Its plain, vernacular quality struck an understated aesthetic tone for the first permanent element of the new World Trade Center.

WHEN designing, one partner will typically draw the font while the other acts as editor and kibitzer. Or one might draw the text version, while the other draws the display version. They are currently designing Mercury and Chronicle typeface, intended for newspapers.

"Working together has diminished by half the number of opportunities that are available to us individually," Mr. Hoefler said, "but it's doubled our ability."

The centerpiece of the office is a double-sided bookcase 16½ feet long and 8 feet high, from which specimen books fly when the partners delve into typographic history. They finish each other's sentences, ranging with easy erudition from the influential printer and type historian Theodore L. De Vinne to a 1950's potato-chip-shaped typeface called Calypso. It's by Roger Excoffon, they point out.

Within minutes, their conference table is piled high with the Stempel specimen book; an 1882 catalog from George Bruce's Son & Company of Chambers Street; MacKellar, Smiths & Jordan's "11th Book of Specimens of Printing Types and Every Requisite for Typographical Uses and Adornment"; and the 1977 Letraset catalog.

Mr. Frere-Jones looks up. "When we start grabbing books off the shelf - "

" - we need to be stopped," Mr. Hoefler says.

From: Leslie Hayden Sherr <lsherr@yahoo.com>
Subject: Need your input, please
Date: August 24, 2003 11:06:40 PM EDT
To: hoefler@typography.com, frere-jones@typography.com, borsella@typography.com

Dear H&FJ,

Can we arrange a time to talk today so that I can have each of your input on the following? Let me know a time that might work. I'm also downtown on Monday and can swing by at the end of the day, if that makes sense. Version below includes quote from Ellen and info on upcoming events. I'm sure you have comments and content is missing. Thank you. Best, L

FOR IMMEDIATE RELEASE
September 2003

Jonathan Hoefler and Tobias Frere-Jones Announce the Merger and Creation of Hoefler & Frere-Jones Typography

New Name and Logo Design Formalize an Ongoing Creative Dialogue

September 1, 2003, New York, NY~Jonathan Hoefler, Principal of The Hoefler Type Foundry, and Tobias Frere-Jones, Type Director of The Hoefler Type Foundry, announced today that they have entered into an agreement to become equal partners and to rename the business Hoefler & Frere-Jones Typography.

The name change is conveyed through a new corporate identity. The silhouette of a piece of traditional moveable type establishes a motif into which the initial letters of H&FJ appear in white knocked out of black. The shape was chosen to convey the foundry,s relationship to an ongoing legacy of type design. The capital letters of the logo design are rendered in a slightly modified version of the Hoefler-designed font Gotham. The overlapping loop of the ampersand is intended to subtly convey the idea of the two designers working together.

Considered two of the most influential typographers of the last decade, Hoefler and Frere-Jones have in fact been actively working together since 1999. During that time they have collaborated on projects for The Wall Street Journal, Martha Stewart Living, Nike, Esquire, GQ and The New York Times Magazines, among others.

„The creation of Hoefler & Frere-Jones is a logical and exciting partnership based on what has been a rewarding and complementary collaboration between Tobias and myself for a long time. Although we are formally joining talents, portfolios and passions to become Hoefler & Frere-Jones Typography, we will retain our individual expertise and historical focus, thus enhancing our ability to provide an expanded range of clients with unique, highly crafted fonts,‰ remarked Jonathan Hoefler.

AIM IM with Jonathan Hoefler <hoefler@mac.com> 7/23/13 6:51 PM

heighho

You here?

6:55 PM

hey there

leaving in a bit though

np;

mind if we do 12:30 instead of 12:00 tomorrow?

that should be fine

Thanks.

2nd thing: I'm going to have some things for you on the Bigger Stake In The Company conversation.

If you don't mind, I think I'm going to type these up & send them to you for your perusal, rather than putting you on the spot at a lunch. That way you'll have time to digest, discuss, & react.

I might need a few more days than expected, though: I am shooting for 7/31, but we're now in that Everyone You Need Is Out On Their Boat part of the year. I'll know more on Monday.

Is that ok?

so this is something I'd get tomorrow and discuss later? Sorry, can't tell which point in time is which

I'm also heading out shortly btw.

no, sorry — I'm still putting everything together, and had hoped to have something to give you next week, but I'm waiting for a guy who I think is now away. (Or is at least not returning calls, which is odd since I met with him last Tuesday.)

I'd like to get you something as soon as possible, and then we can talk about it whenever you've had a chance to think about it.

ok, I'm preparing thoughts and ideas over here, also with the 31st in mind

ok, but tell you what: why not let me send you something to react to first, which should save you some trouble.

ok, let me know how you go at getting people to return calls 

Will do!

On that note, see you anon.

I'll have a stupid question for you about how to join two paths in RoboFont.

(Is it me or this application 99.9% intuitive, and .1% IMPOSSIBLE TO FIGURE OUT?)

there is a bit of that, yes 

hopefully I'll have a clever answer for you 

anyway gotta run 

Ditto. See you tomorrow!

8:13 PM

Jonathan Hoefler is now offline.

9:12 AM

Jonathan Hoefler is now online.

9:16 AM

Jonathan Hoefler is now offline.

Jonathan Hoefler is now online.

9:46 AM

Jonathan Hoefler is now offline.

For Immediate Release

17 January 2014

Last week, designer Tobias Frere-Jones, a longtime employee of The Hoefler Type Foundry, Inc. (d/b/a "Hoefler & Frere-Jones"), decided to leave the company. With Tobias's departure, the company founded by Jonathan Hoefler in 1989 will become known as HOEFLER & CO.

Following his departure, Tobias filed a claim against company founder Jonathan Hoefler. Its allegations are not the facts, and they profoundly misrepresent Tobias's relationship with both the company and Jonathan. Whether as The Hoefler Type Foundry, Hoefler & Frere-Jones, or Hoefler & Co., our company has always been a great place for designers, which is why it's always been and will continue to be a great place for design.

It goes without saying that all of us are disappointed by Tobias's actions. The company will vigorously defend itself against these allegations, which are false and without legal merit. In the meantime, we're all hard at work, continuing to create the kinds of typefaces that designers have come to expect from us for more than 25 years.

Contact:
Michael Burke
General Counsel
burke@typography.com

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

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER,

Defendant.

Index No. 650139/2014

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Michael DeLarco
David Baron
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000

Attorneys for Defendant Jonathan Hoefler

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PRELIMINARY STATEMENT

Plaintiff Frere-Jones's ("Frere-Jones" or "Plaintiff") Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint ("Opposition") is rife with irrelevancies and legal error. Frere-Jones makes three primary arguments:

(1) that his 1999 oral agreement for half of the equity in the Hoefler Type Foundry ("HTF" or the "Company") was formed with Jonathan Hoefler, *individually*, not with HTF itself and, therefore, the 2004 written agreements between Frere-Jones and HTF (which are inconsistent with Frere-Jones's claim to equity in HTF as part of the alleged 1999 oral agreement) do not preclude his claims that Hoefler must cede half of his own personal shares in HTF to Frere-Jones (Opp. 3–8, 19–23);

(2) for pleading purposes, Frere-Jones's allegation that he "first learned that Hoefler reneged on his personal agreement to transfer 50% of HTF on October 21, 2013" must be accepted as true on this Motion to Dismiss and thus there is no way a statute of limitations has run on any of his claims (Opp. 10–17); and

(3) that, alternatively, even if Hoefler is correct that all claims accrued as of 2004, Frere-Jones's claims are either tolled pursuant to General Obligations Law § 17-101 or Hoefler should be equitably estopped from raising a limitations defense because of alleged vague oral statements and communications (which are exhibited to Frere-Jones' Opposition Affidavit) in which Hoefler referred to Frere-Jones as his business "partner" (Opp. 15–19).

These arguments are easily rebutted in this Reply.

First, Frere-Jones's citations to the "separateness" of a corporation from its sole shareholder, as well as his claim that his alleged 1999 oral agreement was with Hoefler in his personal capacity and not Hoefler as President and sole shareholder of HTF, are just a smokescreen. It does not matter for statute of limitations purposes who Frere-Jones's counterparty was in 1999. All that matters is *when* his claims accrued and, as Defendant has already shown (and will show again here), Frere-Jones's claims accrued no later than 2004.

Second, Frere-Jones's assertions that he "first learned Hoefler had reneged" in 2013 is not the standard for when a cause of action accrues for statute of limitations purposes. Regardless of Frere-Jones's subjective awareness of Hoefler's actions, the alleged contract and

quasi-contract claims (First through Fourth Causes of Action) accrued no later than 2004 when Plaintiff alleges he completed his part of the "deal" and accrued the right to demand performance from Hoefler. The same is true of the fraud claim (Fifth Cause of Action), where the standard for accrual is an objective one—when a reasonable person would have been on inquiry notice—not the subjective standard that Frere-Jones suggests. It was unreasonable as a matter of law for Frere-Jones to delay suit ten years to 2014 when, as of 2004, there was allegedly nothing left but for Hoefler to execute an uncomplicated transfer of equity that could have been done in a matter of minutes.

Third, Frere-Jones's reliance on the exhibits to his Affidavit to satisfy General Obligations Law § 17-101 ("Section 17-101") or the elements of equitable estoppel is misplaced. Contrary to the requirements of Section 17-101, not a single exhibit acknowledges any outstanding debt owed to Frere-Jones, let alone the specifically-alleged promise that Hoefler made in 1999 to cede half of his shares in the Company. Rather, the documents contain nothing more than vague and casual references to Frere-Jones as Hoefler's "partner." And, significantly, it is undisputed that Frere-Jones is *not* claiming that a valid partnership was ever formed under New York law—rather, he claims that Hoefler's promise concerned a transfer of existing shares in a corporation. There is simply no way that these documents can satisfy Section 17-101 or rise to the level of an equitable estoppel on the long-run statutes of limitations.

Finally, Frere-Jones's attempt to distinguish Hoefler in his personal capacity from Hoefler as President of HTF has no bearing on the preclusive effect of the 2004 Assignment and Employment Agreements under either the parol evidence rule or the law governing the relationship between written contracts and quasi-contractual claims. The parol evidence rule prevents using a prior oral agreement to contradict a subsequent written agreement between the

parties *or their privies*. Hoefler and HTF are in privity as a matter of law. Further, if they were not, there would be no consideration for Hoefler's alleged promise to cede half of his "personal" equity in return for Frere-Jones's "performance," which, by his own allegations, was provided exclusively for the benefit of HTF—not Hoefler's. The alleged distinction between Hoefler and HTF as a matter of New York corporation law similarly has no impact on the fact that his quasi-contract claims are precluded by the written 2004 Assignment and Employment Agreements. It is well-settled that this doctrine applies whenever a written contract governs the *subject matter* of a dispute between two parties, even where a party in litigation was not party to the contract.

In short, not a single one of Plaintiff's arguments is sufficient to overcome the fact that his claims are both (i) time-barred and (ii) precluded by the existence of written agreements that supersede the alleged oral agreement upon which all of his claims are based and are strikingly devoid of any promise of equity in HTF as consideration for Plaintiff's contributions.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE TIME-BARRED

A. Plaintiff's Claims Are Time-Barred Because They All Accrued As A Matter of Law No Later Than March 2004

i. *Plaintiff's contract and quasi-contract claims accrued the moment Plaintiff could have demanded the equity from Hoefler in March 2004*.

Plaintiff seeks to make an end-run around the applicable statutes of limitations with his self-serving statement that he only became aware that Hoefler did not intend to provide him with half of the equity in HTF as of October 21, 2013. (Opp. 10–11.) However, it is well-settled that the statutes of limitations for contract and quasi-contract claims accrue *not when an individual is on actual notice*, but at the time of the alleged breach—that is, when the party making the claim possesses the legal right to demand performance on the contract. *Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 18 N.Y.3d 765, 770–71 (2012); *Oechsner v. Connell Ltd. P'ship*, 283 F.

Supp. 2d 926 (S.D.N.Y. 2003), *aff'd* 101 F. App'x 849 (2d Cir. 2004); *Huang v. Slam Commercial Bank Pub. Co.*, 247 F. App'x 299, 300 (2d Cir. 2007); s*ee also*, *e.g.*, *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993) (breach of contract claim accrues at time of breach); *Schmidt v. McKay*, 555 F.2d 30, 36 (2d Cir. 1977) (promissory estoppel claim accrues at time of breach); *Aufferman v. Distl*, 56 A.D.3d 502, 502 (2d Dep't 2008) (unjust enrichment claims and demands for constructive trust accrue on event giving rise to duty of restitution). "To hold otherwise would allow [a party] to extend the statute of limitations indefinitely by simply failing to make a demand." *Hahn Auto. Warehouse*, 18 N.Y.3d at 771 (citing cases; quotations omitted); *see also State of New York v. City of Binghamton*, 72 A.D.2d 870, 871 (3d Dep't 1979) ("The Statute of Limitations begins to run when the right to make the demand for payment is complete, and the plaintiff will not be permitted to prolong the Statute of Limitations simply by refusing to make a demand.").

Here, Plaintiff alleges that he completed his performance under the alleged 1999 oral agreement in March 2004. (Compl. ¶ 29.) At that point, Plaintiff had the right to demand that Hoefler perform his alleged end of the "bargain" by transferring half of Hoefler's equity in HTF to Plaintiff. Accordingly, the six-year statute of limitations began to run—at the latest—in March 2004. Because Plaintiff failed to file this lawsuit until January 2014—ten years after the alleged breach—his breach of contract and quasi-contract claims are time-barred as a matter of law.

Plaintiff cites no case law to refute this proposition except for *Sitkowski v. Petzing*, 175 A.D.2d 801 (2d Dep't 1991), in an attempt to save his constructive trust claim (Third Cause of Action). But *Sitkowski* is of no help to Plaintiff here, even on constructive trust. In *Sitkowski*, the plaintiff acknowledged that the defendant initially acquired the property that was the subject

of the alleged trust *lawfully* and that "the defendant breached the trust relationship at some later date." *Id.* at 802. Here, in contrast, Plaintiff alleges that Hoefler *wrongfully* acquired Plaintiff's performance in 1999 and certainly no later than 2004 by making "false representations and promises . . . in order to induce Frere-Jones to transfer the Dowry Fonts and cause Frere-Jones to resign from Font Bureau, relocate to New York, and contribute his name, reputation, industry connections and design authority to HTF." (Compl. ¶ 72). Thus, Plaintiff's demand for a constructive trust was required as of 2004—the latest HTF received Frere-Jones's property—and was untimely as of March 2010. *Aufferman*, 56 A.D.3d at 502–03; *cf. Dolmetta v. Uintah Nat'l Corp.*, 712 F.2d 15, 18 (2d Cir. 1983) (duty of restitution arose on constructive trust claim on the day that defendant acquired shares alleged to have been wrongly possessed).

ii. *Plaintiff's fraud claim is also time-barred.*

Plaintiff asserts that his fraud claim (Fifth Cause of Action) is timely because Hoefler's alleged "repeated assurances" that he would give Plaintiff half of his shares in the Company reasonably delayed Frere-Jones's discovery of the fraud all the way from 2004 to October 2013. (Opp. 14–15). Plaintiff cannot so easily elude the well-established duty of inquiry he was obligated, but failed, to discharge after he allegedly performed on the oral agreement in 2004. *Gutkin v. Siegal*, 85 A.D.3d 687, 688 (1st Dep't 2011) ("Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for an investigation, knowledge of the fraud will be imputed to him."); *see also Kaufman v. Cohen*, 307 A.D.2d 113, 122 (1st Dep't 2003).

Here, Frere-Jones was aware at all times of the terms and conditions of the alleged 1999 oral agreement. He allegedly began complaining about not getting half of the equity of the

Company in March 2004—immediately after he transferred the Dowry Fonts, his name, and his work for the benefit of the Company per the 2004 Assignment and Employment Agreements. (Compl. ¶ 29). Plaintiff also claims that after he entered into the 2004 agreements, he "repeatedly discussed [with Hoefler] completing [the] original deal" (Pl. Aff. ¶ 11), each time knowing that his "discussions" did not result in any transfer of Company shares to him. The same can be said of the e-mails exhibited by Plaintiff to his Affidavit: despite Hoefler's reference to him as his "partner," Plaintiff certainly knew when these e-mails were drafted that Hoefler had not given him any equity. (*E.g.*, Pl. Aff. Exs. I & J.)

It is therefore beyond dispute that Frere-Jones possessed, *despite any claimed assurances of performance by Hoefler*, timely knowledge sufficient to place upon him a duty to make inquiry, ascertain for himself all relevant facts prior to the expiration of the applicable limitations period, and timely file suit. *See Gleason v. Spota*, 194 A.D.2d 764, 765 (2d Dep't 1993). "For plaintiff to have relied on [Hoefler's] misrepresentations after the time at which he should have known of the fraud cannot be said to have been reasonable." *Pashaian v. Eccelston Props., Ltd.*, No. 92-civ-5487(JSM), 1993 WL 322835, *3 (S.D.N.Y. Aug. 16, 1993).

Finally, though Plaintiff suggests that his knowledge of the fraud is an issue that cannot be decided on a motion to dismiss, "[t]he test as to [whether a] fraud should [have been discovered] with reasonable diligence . . . is an objective one" that New York courts routinely apply to dismiss fraud claims in this posture. *Gutkin*, 85 A.D.3d at 688; *Dinerman v. WOR Radio*, 31 Misc.3d 133(A), *1 (N.Y. App. Term 2011) (granting motion to dismiss fraud claim where plaintiff failed to file suit within two years of when she should have discovered the fraud); *Prestandrea v. Stein*, 262 A.D.2d 621, 622–23 (2d Dep't 1999) (same); *Cole v. Furman*, 285 A.D.2d 982 (4th Dep't 2001) (same). Plaintiff has attempted to portray himself as naïve in his

Complaint, but ignorance and naivety do not excuse a failure to bring suit for ten years simply because the defendant is alleged to have offered vague "reassurances".

B. The E-mails And Instant Message Exhibited To Plaintiff's Affidavit Do Not Toll The Statutes Of Limitations Under General Obligations Law § 17-101

Plaintiff attempts to bar the application of the statutes of limitations by asserting that his "causes of action are nevertheless renewed because Hoefler had in fact 'repeatedly acknowledged his obligation' to transfer half of his ownership in HTF in writing." (Opp. 16). The "writings" Plaintiff relies on consist entirely of (a) e-mails that casually refer to Plaintiff as Hoefler's "partner" and (b) an instant message reading, "I'm going to have some things for you on the Bigger Stake in the Company conversation." (Pl. Aff. Exs. A–J, M).

These documents are plainly insufficient under Section 17-101, which states: "the only competent evidence of a new or continuing contract" sufficient to take an action out of an applicable statute of limitations is "[a]n acknowledgement or promise contained in a writing signed by the party to be charged thereby." *See also Morris Demolition Co. v. Bd. of Educ.*, 40 N.Y.2d 516, 520 (1976); *Burrowes v. Combs,* 25 A.D.3d 370, 371 (1st Dep't 2006) (declining to apply Section 17-101 to toll statutes of limitations on claims for contract, quasi-contract, and fraud). Indeed, as Plaintiff's own cases show, Section 17-101 requires that "the writing must recognize an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it." *Bild v. Konig*, No. 09-civ-5576, 2011 WL 666259, *4 (E.D.N.Y. Feb. 14, 2011) (writing that contained no promise to pay was insufficient to toll the statute of limitations under Section 17-101) (quotation omitted); *see also Banco do Brasil v. State of Antigua & Barbuda*, 268 A.D.2d 75, 77 (1st Dep't 2000) (written and signed letter confirming the existence of four balances and acknowledging a total amount owed was sufficient under Section 17-101); *Faulkner v. Arista Records LLC*, 602 F. Supp. 2d 470, 476 (S.D.N.Y. 2009) (three signed letters

noting that the defendant "remains committed to resolving all of the outstanding issues" and "would be willing to pay . . . accrued royalties" deemed sufficient under Section 17-101); *Lincoln-Alliance Bank & Trust Co. v. Fisher*, 247 A.D. 465, 466 (4th Dep't 1936) (signed letter acknowledging debt in the form of a $10,000 note sufficient under predecessor to Section 17-101).

Contrary to the requirements of Section 17-101, Plaintiff's exhibits simply do not acknowledge any existing debt owed to Frere-Jones, let alone the specifically-alleged promise to transfer to Plaintiff half of Hoefler's personal equity in the Company. In fact, these "writings" are devoid of any reference whatsoever to "ownership" or "equity" in the Company. Accordingly, Plaintiff fails to satisfy Section 17-101 as a matter of law.

C. The Doctrine Of Equitable Estoppel Does Not Save Plaintiff's Claims

In the alternative, Plaintiff asserts that Hoefler's alleged repeated assurances (apparently over the course of ten years) that he "intended to honor their deal" and "would get to it later" preclude Hoefler's statutes of limitations defense under the doctrine of equitable estoppel. (Opp. 17–19.) This argument fails on several grounds.

First, just as a mere oral promise to perform is insufficient under Section 17-101, it is also "insufficient to create an equitable estoppel barring defendant's resort to the Statute of Limitations." *Donahue-Halverson, Inc. v. Wissing Constr. & Bldg. Servs. Corp.*, 95 A.D.2d 953, 954 (3d Dep't 1983) ("a vague assurance" by a defendant that he will "pay plaintiff for the amount properly owed does not reflect such conduct as would support an equitable estoppel") (citing cases); *Dialcom, LLC v. AT&T Corp.*, No. 12026/03, 2004 WL 5825128 (Sup. Ct. Kings Cnty. July 20, 2004) ("It is well-settled that a mere promise to pay and/or to otherwise perform under an agreement is insufficient to warrant the invoking of the doctrine of equitable estoppel[.]"). Such an assurance simply does not rise to an "induce[ment] by fraud,

misrepresentation or deception to refrain from timely commencing suit," which is required to allege an equitable estoppel. *Donahue-Halverson, Inc.*, 95 A.D.2d at 954 (citing cases); *see also Dep't of Hous. Pres. and Dev. v. 849 St. Nicholas Equities*, 141 Misc.2d 258, 273–74 (Civ. Ct. N.Y. Cnty. 1988) ("where the statement of account is simply a reiteration of that concerning which agreement has already been made there is no reason that the statute [of limitations] should begin anew and that the debtor should be deprived of the privilege of claiming the running of the statute") (internal quotations omitted). Here, the alleged vague promises and assurances by Hoefler that he intended to honor their "deal" are precisely the type of statements the courts in *Donahue-Halverson*, *Dialcom*, and *849 St. Nicholas Equities* held are insufficient to invoke the equitable estoppel defense as no reasonable person would refrain from filing suit based on such alleged statements.[1]

Second, "equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action." *Kaufman*, 307 A.D.2d at 122 (citing *Rizk v. Cohen*, 73 N.Y.2d 98, 105–06 (1989)). Where "the very same wrongful act . . . forms the basis of both the estoppel argument and the underlying claims," a plaintiff may not avail himself of the doctrine of equitable estoppel. *Id.* Here, Plaintiff's equitable estoppel argument is based on the allegation that Hoefler misrepresented facts regarding his performing on the alleged 1999 promise to transfer half of the shares in the Company. (Opp. 18–19.) This is the precise conduct Plaintiff

[1] The cases on which Plaintiff relies are inapposite to the facts alleged here. *See*, *e.g.*, *Simcuski v. Saeli*, 44 N.Y.2d 442 (1978) (equitable estoppel applied to toll statute of limitations in medical malpractice action where physician deliberately concealed the fact that plaintiff's symptoms were caused by a surgery he performed); *Bild*, 2011 WL 666259, at *5 (defendants actively convinced plaintiff not to file a known claim by misrepresenting to plaintiff that (i) they had entered an agreement acknowledging the money owed and providing collateral for its repayment, (ii) an arbitrator intended to require one of the defendants to pay the note, and (iii) plaintiff should seek repayment through a pending arbitration involving the defendants); *Gen. Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 128–29 (1966) (equitable estoppel properly pled where delay in suit was caused by defendant's "carefully concealed crime").

alleges forms the basis for all of his claims. (Opp. 10–12.) *See also Dialcom*, 2004 WL 5825128 (plaintiff's breach of contract and other causes of action were that defendants misrepresented and concealed facts concerning their performance or lack thereof; that same conduct was insufficient to support an equitable estoppel claim). Accordingly, such conduct cannot support an equitable estoppel.

Third, as set forth in Point I.A., *supra*, Plaintiff has not and cannot show he satisfied his duty of inquiry regarding Hoefler's alleged fraudulent misrepresentations. Such failure precludes Plaintiff from using equitable estoppel to bar application of the statutes of limitations. *Gleason*, 194 A.D.2d at 765 ("Equitable estoppel will not toll a limitations statute, however, where a plaintiff possesses timely knowledge sufficient to place him or her under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable Statute of Limitations.") (citing cases; quotation omitted); *Dialcom*, 2004 WL 5825128; *see also Kaufman*, 307 A.D.2d at 122 (fraud claim and equitable estoppel claim cannot be based on the same alleged misrepresentation otherwise "the mere assertion of an underlying fraudulent act would always trigger equitable estoppel and render the discovery accrual rule for fraud actions superfluous").

II. PLAINTIFF'S CONTRACT AND QUASI-CONTRACT CLAIMS ARE PRECLUDED BY THE 2004 ASSIGNMENT AND EMPLOYMENT AGREEMENTS

A. Plaintiff's Claims Are Precluded By The 2004 Written Agreements Because Hoefler Is In Privity With HTF And Because The Agreements Cover The Subject Matter Of Plaintiff's Claims

Separate and apart from the statutes of limitations, Plaintiff's breach of contract and quasi-contract claims are precluded by the existence of the written 2004 Assignment and Employment Agreements. (Def. Mtn. 16–21.) The heart of Plaintiff's Opposition is that Hoefler

cannot rely on the written agreements because Plaintiff is suing Hoefler in his individual capacity while the 2004 Agreements were negotiated and executed by Hoefler in his corporate capacity. (Opp. 4–6, 19–20, 21). This argument lacks merit.

First, as Plaintiff's own case law shows, the parol evidence rule applies to a controversy "between the parties to the contract *or their privies*." *Bell v. Liberty Drug Co.*, 16 A.D.2d 809, 810 (2d Dep't 1962) (emphasis added); *see also Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N.Y. 591 (1882). As President and owner of HTF, Hoefler was at all times in privity with HTF for purposes of the parol evidence rule. *See*, *e.g.*, *Specialty Rests. Corp. v. Barry*, 236 A.D.2d 754, 755 (3d Dep't 1997) (defendant's status as president, shareholder, and director of corporation constituted privity as a matter of law); *Briggs v. Chapman*, 53 A.D.3d 900, 901–02 (3d Dep't 2008) (defendant corporation was in privity with and bound by prior determination against officers, shareholders and owners of the corporation); *Provident Bank v. Tropp*, 43 Misc.3d 1204(A), *4 (Sup. Ct. Kings Cnty. 2014) (sole shareholder and President of corporation was in privity with corporation, as "controlling status over a corporation constitutes privity as a matter of law").

Indeed, under Plaintiff's own theory of the case, Hoefler and HTF must be in privity with each other or else there is no consideration for Hoefler's alleged promise to cede half of his "personal" equity in return for Frere-Jones's "performance," which performance, by Plaintiff's own allegations, was provided exclusively to HTF—not to Hoefler. (*See* Compl. ¶¶ 13, 46, 47, 51, 59, 69; Opp. 1, 20.) The parol evidence rule thus applies in this case and Plaintiff is precluded from adding Hoefler's alleged personal duty to transfer half of HTF's equity to the terms of the written 2004 Assignment and Employment Agreements based on an alleged prior oral representation.

Plaintiff's attempt to distinguish between Hoefler in his individual versus corporate capacities similarly fails to save his quasi-contract causes of action. The doctrine precluding recovery in quasi-contract where a written contract exists looks to whether the written contract governs "a particular *subject matter*"—not to the parties to the agreement. *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987) (emphasis added). Accordingly, this doctrine applies to protect not only the contracting parties but non-contracting parties as well. *Feigen v. Advance Capital Mgmt. Corp.*, 150 A.D.2d 281, 283 (1st Dep't 1989) (dismissing unjust enrichment claim against non-contracting party because "a non-signatory to a contract cannot be held liable [in quasi-contract] where there is an express contract [with another] covering the same subject matter"); *Bellino Schwartz Padob Adver., Inc. v. Solaris Mktg. Grp.*, 222 A.D.2d 313, 313 (1st Dep't 1995) (existence of an express contract between defendant and plaintiff governing the subject matter of the plaintiff's claims also barred any quasi-contractual claims against defendant third-party non-signatory to written contract); *Metro. Elec. Mfg. Co. v. Herbert Constr. Co.*, 183 A.D.2d 758, 759 (2d Dep't 1992) ("the existence of an express contract . . . governing the particular subject matter of [plaintiff's] claim for unjust enrichment precludes the plaintiff from maintaining a cause of action sounding in quasi contract against" non-contracting party). Thus, the fact that Hoefler did not execute the 2004 Employment and Assignment Agreements in his personal capacity has absolutely no bearing on the preclusive effect of those writings because they cover the same subject as Plaintiff's claims.

B. The 2004 Assignment And Employment Agreements Are Substantively Sufficient To Preclude His Contract and Quasi-Contract Claims

Plaintiff also claims that the 2004 Employment and Assignment Agreements do not preclude his claims because (i) they "do not govern the issue of equity in HTF" (Opp. 21), and

(ii) the Employment Agreement does not contain a "standard merger or integration clause" (Opp. 8). These arguments are without merit.

Plaintiff's first argument is a perversion of the parol evidence rule, which bars evidence not only that contradicts a writing but that purports to vary or supplement it. *E.g.*, *Primex Int'l Corp. v. Wal-Mart Stores, Inc.,* 89 N.Y.2d 594, 600 (1997); *Marine Midland Bank-S. v. Thurlow,* 53 N.Y.2d 381, 387–88 (1981). By arguing that his suit can proceed because the written agreements do not specify equity in the Company as consideration in addition to the consideration actually enumerated therein, Plaintiff seeks to defeat the entire purpose of the parol evidence rule. The single case on which Plaintiff relies, *Joseph Stenberg, Inc. v. Walber 36th St. Assocs.*, 187 A.D.2d 225 (1st Dep't 1993), does not support his position. There, a condition occurred between the parties for which the contract at issue did not account, namely the close of a sale at a price lower than anticipated. *Id.* Defendant took the position that the plaintiff, a broker, was not entitled to any commission on his sale of a property because the property sold at lower than listing price. *Id.* Because the contract did not account for this contingency, and given the policy implications if a broker were not entitled to commission on any sale below listing price even if his or her efforts brought about the sale, the court found that the contract was ambiguous on this point. *Id.* at 228–29. Here, in contrast, no condition has occurred that is not contemplated by the 2004 writings. Those writings required Plaintiff to do everything he alleges to have done in exchange for employment and other consideration, but *not* equity in HTF. Plaintiff's attempt to compare an unaccounted-for condition in *Joseph Stenberg* to an unaccounted-for piece of consideration in this case—particularly one as significant as half of a company—is without merit and contrary to applicable case law. *See Braten v. Bankers Trust Co.*, 60 N.Y.2d 155, 161–63 (1983) (dismissing claim based on alleged oral agreement prior to

written instrument where written instrument recited consideration but not that which plaintiffs sought to enforce; "[s]uch a fundamental condition would hardly have been omitted").

Also without merit is Plaintiff's assertion that the Employment Agreement is insufficient to preclude the alleged 1999 oral agreement because it does not contain a "standard merger or integration clause."[2] (Opp. 8.) Where the agreement in question does not contain a specific merger clause, it may nevertheless be held integrated as a matter of law, especially when the allegedly missing term is one so fundamental as additional consideration. *Braten*, 60 N.Y.2d at 162–63. Thus, the lack of a merger clause is an insufficient basis to allow parol evidence of additional consideration—a "fundamental condition" that "would hardly [be] omitted" from a writing. *Id.*; *see also Wayland Inv. Fund, LLC v. Millenium Seacarriers, Inc.*, 111 F. Supp. 2d 450, 455 (S.D.N.Y. 2000) (dismissing complaint under parol evidence rule, which prevented consideration of alleged alternative form of payment than that contemplated by written instrument, despite absence of merger clause, because form of payment was a condition that "would hardly have been omitted" from the writing). Plaintiff's claim that he was entitled to half of Hoefler's company is hardly a condition that would have been omitted from the Employment Agreement; Plaintiff is thus precluded from alleging his entitlement to additional consideration beyond the 2004 written agreements.

III. PLAINTIFF'S FRAUD CLAIM MUST BE DISMISSED AS DUPLICATIVE OF HIS CONTRACT CLAIM BECAUSE IT IS NOT BASED ON ANY INDEPENDENT DUTY ARISING FROM A FIDUCIARY RELATIONSHIP

Plaintiff argues that his fraud claim should not be dismissed as duplicative of his contract claim because such claims "may co-exist where, as here, the defendant has a fiduciary duty to the plaintiff." (Opp. 23). In making this argument, Plaintiff asserts that Hoefler owed a fiduciary

[2] The Assignment Agreement—which governs the transfer of the Dowry Fonts and explicitly proscribes against construing the parties as a partnership—does contain a merger clause.

duty to Frere-Jones because they were "business partners." (*Id*.) This argument fails, however, because Plaintiff has not alleged in his Opposition the existence of a valid and enforceable partnership agreement—nor can he. (Def. Mtn. 18-19.)

Plaintiff's fiduciary duty argument also fails because Plaintiff has not alleged the breach of any duty that is independent of Hoefler's alleged duty to perform on the 1999 oral agreement. As Plaintiff's own cases show, merely alleging the breach of a fiduciary duty is insufficient: where a breach of fiduciary duty arises from a breach of contract, a plaintiff must allege some "unlawful purpose other than the breach itself," otherwise he has "stated only a contract action, and not one in tort." *GLM Corp. v. Klein*, 665 F. Supp. 283 (S.D.N.Y. 1987). For example, in *GLM*, the plaintiff alleged not only that the defendants breached their contract, but that they did so "intentionally . . . in a manner calculated to significantly decrease [plaintiff's] competitive position" for the defendants' own benefit. *Id.* at 286. Thus, GLM had alleged an extra-contractual intent for the defendants' actions. Here, in contrast, Plaintiff alleges only Hoefler's intent to breach the contract. (Compl. ¶ 72.) And as Plaintiff's other cited case holds, a fraud claim must fail despite an alleged fiduciary relationship where it "is premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement." *Bridgestone/Firestone*, 98 F.3d 13, 20 (S.D.N.Y. 1996) (quoting *McKernin v. Fanny Farmer Candy Shops, Inc.*, 176 A.D.2d 233, 234 (2d Dep't 1991)); *see also Papa's-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1162 (S.D.N.Y. 1996) (dismissing fraud claim where "[t]he complaint does not allege a fraud claim that is sufficiently distinct from the breach of contract claim" but "merely appends allegations about [defendant's] state of mind to the claim for breach of contract").

Plaintiff's final argument is that he "is permitted to plead contract and fraud in the alternative" on a motion to dismiss. (Opp. 23.) But, unlike here, the single case he cites for this proposition involves "varying allegations suggesting affirmative deception" that also supported a claim for breach of the implied covenant of good faith and fair dealing, an extra-contractual obligation. *See Citi Mgmt. Group, Ltd. v. Highbridge House Ogden, LLC*, 45 A.D.3d 487, 487 (1st Dep't 2007). Fraud claims are routinely dismissed on motions to dismiss where, as here, they are duplicative of an asserted breach of contract. (Def. Mtn. 21–22.)

CONCLUSION

For the foregoing reasons, and for the reasons set forth in his Motion, Hoefler respectfully submits that the Complaint should be dismissed in its entirety and with prejudice.

Dated: New York, New York
April 18, 2014

HOGAN LOVELLS US LLP

By: /s/ Michael E. DeLarco
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July 7, 2014

By ECF and Hand Delivery

Honorable Jeffrey K. Oing
Justice of the Supreme Court
Supreme Court of the State of New York
60 Centre Street
New York, NY 10007

Re: Frere-Jones v. Hoefler, Index No. 650139/2014

Dear Justice Oing:

As counsel for Plaintiff Tobias Frere-Jones, we respectfully request that a discovery conference be scheduled on or before July 22nd when this Court hears argument on a pending motion to dismiss the complaint, to resolve a significant discovery dispute related to the motion. We have conferred in good faith with counsel for the Defendant and reached an impasse.

Background. This is an action to enforce an agreement made between Plaintiff Frere-Jones and Defendant Hoefler to become equal owners in The Hoefler Type Foundry, Inc. ("HTF"). Their agreement was that Frere-Jones would contribute his name, reputation, industry connections and design authority, as well as certain fonts he had already developed and owned, valued in excess of $3 million, in exchange for half of Hoefler's equity in HTF. Frere-Jones fully performed all of his agreed obligations, and he moved to New York to do so. HTF, their jointly-owned business, was renamed and operated as "Hoefler & Frere-Jones."

Hoefler accepted all of the benefits provided by Frere-Jones – including the tremendous recognition, success and prosperity that resulted when HTF changed its name to "Hoefler & Frere-Jones" and marketed the fonts contributed by Frere-Jones. Although Hoefler repeatedly promised he would transfer the agreed 50% share of his ownership in HTF, he did not do so. On October 21, 2013, Hoefler finally told Frere-Jones that he would not be transferring the equity as he had long promised. This suit was commenced shortly thereafter.

Hoefler has moved to dismiss the complaint. This Court has scheduled oral argument on that motion on July 22nd.

The Discovery Dispute. On April 11, 2014, we served a Request for Production of Documents under CPLR Rule 3120. In response, Hoefler's counsel advised that they did not wish to engage in any discovery until after the pending motion to dismiss is decided. Counsel conferred, but we were unable to reach any agreement, not even one concerning scheduling a Preliminary Conference or completing this Court's Electronic Discovery Order.

Hoefler's position, taken unilaterally, violates Rule 11(d) of the Rules of the Commercial Division which clearly and unequivocally provides that discovery is not stayed pursuant to CPLR 3214(b) pending the determination of a dispositive motion unless the court determines, upon application of counsel, whether the stay applies. To date, Defendant Hoefler has not made a motion for a protective order or a stay of discovery as required by this Court's Rules. Nor has Hoefler's counsel proffered any exceptional reason to stay all discovery. Their stated concerns were expense and confidentiality of HTF's business information. We offered to agree to a Confidentiality Agreement to accommodate Hoefler's concerns but that offer was not accepted.

Furthermore, Hoefler's motion to dismiss is based upon his denial of facts alleged in the complaint which, of course, must be accepted as true. The contested facts as alleged by Frere-Jones are supported by an exhaustive written record referred to in the complaint and provided to this Court in opposition to the motion to dismiss. Moreover, Hoefler's motion to dismiss depends solely upon inferences drawn most favorably to Hoefler and not, as universally required by New York law, in favor of the plaintiff, Frere-Jones.

In these circumstances, there is no basis to reverse the stated preference of Commercial Division's Rules, and this Court's standard practice, that discovery proceed while a motion to dismiss the complaint is pending.

Respectfully submitted,

Fredric S. Newman

Fredric S. Newman

cc: Michael DeLarco, Esq. (by email)
David Baron, Esq. (by email)

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July 8, 2014

By Electronic Filing and Hand Delivery

Honorable Jeffrey K. Oing
Justice of the Supreme Court
Supreme Court of the State of New York
60 Centre Street
New York, NY 10007

Re: ***Frere-Jones v. Hoefler*, Index No. 650139/2014**

Dear Justice Oing:

We represent Defendant Jonathan Hoefler ("Mr. Hoefler" or "Defendant") in the above-referenced matter. We write in response to Plaintiff's letter dated July 7, 2014.

By way of background, Mr. Hoefler is the owner of a small business, the Hoefler Type Foundry d/b/a Hoefler & Co. (the "Company"), which operates in the highly competitive field of typography. Plaintiff is a former employee of the Company who contends that he and Mr. Hoefler entered into an "oral agreement" at a restaurant in 1999 whereby Mr. Hoefler would give Plaintiff 50% of his equity in the Company. Defendant filed a case-dispositive motion to dismiss ("Motion") on March 6, 2014. Plaintiff's claim that the Motion "is based upon [Defendant's] denial of facts alleged in the complaint" profoundly misrepresents the Motion. Rather, the Motion demonstrates that the statute of limitations on all of Plaintiff's claims expired more than four years ago and that Plaintiff's claims are additionally barred by the parol evidence rule. Plaintiff's quasi-contract claims are similarly barred because there are written contracts governing the subject matter of these claims.

Defendant informed Plaintiff at the latest on March 13, 2014, that Defendant intended to oppose discovery while the motion to dismiss is pending. Plaintiff served his document requests on April 11, 2014, fully aware of Defendant's position, which Defendant reiterated by email dated April 23, 2014. Plaintiff now—four months after learning Defendant's position on discovery and two weeks before the date the Court is scheduled to hear the Motion (July 22)—seeks to involve this Court in compelling discovery while the Motion is pending. Significantly, having waited this long, Plaintiff has not and cannot show how he will be harmed in any way if he is unable to commence discovery before the Motion is decided. To the contrary, Mr Hoefler would be unduly prejudiced by having to conduct discovery before the Motion is decided.

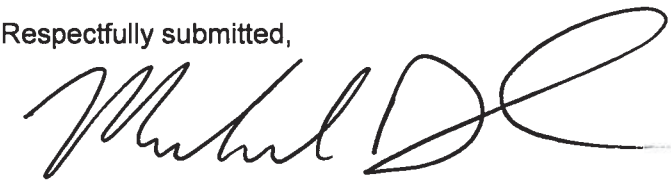
First, Plaintiff seeks an abundance of proprietary trade secrets and confidential information regarding Mr. Hoefler's company. If Mr. Hoefler is required to produce such materials during the pendency of the Motion, and the Motion is granted, Mr. Hoefler will be irreparably harmed. Plaintiff recently and publicly declared through national media outlets his intention to open a firm to compete with Mr. Hoefler. Plaintiff's sudden attempt to involve the Court in his pursuit of Mr. Hoefler's confidential

trade secrets and proprietary information shortly after his public pronouncements and only two weeks before the date the Court is scheduled to hear Defendant's Motion appears calculated solely to obtain as much information as possible about Mr. Hoefler's Company before the Motion is decided in order to aid his attempts to compete with Mr. Hoefler. Although Plaintiff recently offered to enter into a confidentiality agreement, this is an inadequate solution: Mr. Hoefler will be irreparably damaged the moment Plaintiff gains access to Mr. Hoefler's trade secrets and confidential information. Even if a confidentiality order required Plaintiff to destroy or return all confidential and proprietary information in the event the Motion is granted, Plaintiff would not be required to erase what he reviewed from his memory, which would undoubtedly harm Mr. Hoefler and his business.

Second, as noted, Plaintiff's claims are based on an alleged "oral agreement" dating all the way back to 1999. It would be inequitable for Mr. Hoefler to be subject to the costs associated with collecting, processing, hosting, and reviewing fifteen years' worth of documents and electronic data (to the extent such data exists) if the Motion is ultimately granted. This significant financial burden can be easily avoided by staying discovery until the Motion, which is scheduled to be heard in two weeks, is decided by the Court.

In sum, and particularly given the strength of Defendant's Motion, Defendant respectfully submits that there is good cause to stay discovery while the Motion is pending. Courts in the Commercial Division routinely decline to address discovery applications during the pendency of dispositive motions where, as here, good cause is shown. *E.g.*, *Radiancy, Inc. v. Tria Beauty, Inc.*, No. 650025/2011, 2011 WL 11074841, *6 (Sup. Ct. N.Y. Cnty. Sept. 1, 2011); *Upwood Investments Ltd. v. U.S. Bank Nat'l Assoc.*, No. 652046/2010, 2012 WL 10007037, *9 (N.Y. Sup. Ct. N.Y. Cnty. July 17, 2012).

Respectfully submitted,



Michael DeLarco

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

PRESENT: Hon. Oing Justice Part 48

Index No. 650139/14

Tobias Freel-Jones

Plaintiff,

- against -

Jonathan Hoefler

Defendant.

ORDER OF REFERENCE TO COMMERCIAL DIVISION ADR PROGRAM

Due deliberation having been had, it is hereby ORDERED:

(1) This case is referred to the Alternative Dispute Resolution Program of the Commercial Division. An alternative dispute resolution ("ADR") proceeding shall be conducted in this case in accordance with the Rules of the Program. Counsel for all parties shall familiarize themselves with the Rules (which are accessible at www.nycourts.gov/courts/comdiv/ADR_overview.shtml).

(2) If this order is issued at a conference in court, counsel for all parties shall report immediately thereafter to the ADR Office (Room 148 at 60 Centre Street) to meet with an ADR Coordinator. If this order is issued under other circumstances, all counsel shall, within three business days of the date of this order, contact a Coordinator by phone or e-mail (Simone Abrams (SAbrams@nycourts.gov or 212-256-7986)) or fax (212-952-3772) and submit to the Coordinator a fully executed ADR Initiation Form (also accessible at the web address above), in counterparts if necessary.

(3) Counsel shall comply in full with all of the ADR Rules. Failure to do so may result in the imposition of sanctions or other appropriate action by the court.

(4) Proceedings in this action, including discovery and motion practice, shall not be stayed during the ADR process.

In the event the ADR proceeding fails to resolve this case, the parties shall appear for a conference with the court on 10/2/14 at 11 (AM)/PM.

Additional Directives: discovery stayed pending ADR process.

Dated: 7/22/14

J.S.C.

JEFFREY K. OING
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. PART 48
Justice

Index Number : 650139/2014
FRERE-JONES, TOBIAS
vs.
HOEFLER, JONATHAN
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
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). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

"Motion is decided on the record.
Transcript to be So Ordered.
Parties to submit transcript
to the Court forthwith."

Movant directed to order the transcript & bear the costs.

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

Dated: 7/22/14

JEFFREY K. OING 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
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Proceedings

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - CIVIL BRANCH - PART: 48

----------X

TOBIAS FRERE-JONES,

Plaintiff,

-against-

INDEX NO. 650139/14

JONATHAN HOEFLER,

Defendant.

----------X

60 Centre Street
New York, New York 10007

July 22, 2014

B E F O R E:

HONORABLE JEFFREY K. OING, Justice

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AT

THE COURT: Okay. The Court has before it the matter of Tobias Frere-Jones versus Jonathan Hoefler, Index No. 650139 of 2014. This is Motion Sequence No. 1, which is a motion by defendants to dismiss the complaint pursuant to failure to state a cause of action, documentary evidence, as well as statute of limitations.

Having said that, parties enter their appearances for the record.

For the plaintiff?

MR. NEWMAN: Good morning, your Honor, for the plaintiff, Fred Newman, Hoguet, Newman, Regal & Kenney. I'm accompanied by my colleague, Kerin Lin.

THE COURT: Thank you.

For defendants?

MR. DE LARCO: Good morning, your Honor. Michael DeLarco from Hogan Lovells, here with my colleague, David Baron.

THE COURT: Okay. Thank you.

First things first, first thing for the record, we have five causes of action in this case. The first cause of action is for a breach of contract, essentially not a contract -- a written contract, but just to be clear, it's for an oral contract with respect to an alleged partnership formed between the plaintiff and defendant.

The second cause of action is for promissory

estoppel.

The third cause of action is declaration of a constructive trust.

The fourth cause of action is for unjust enrichment.

And to round it all out, the fifth cause of action for fraud.

Okay. Having said that, the sum and substance of what I have here in the record is that the plaintiff, I guess, was the originator or creator of certain fonts or type sets for computer software, which I didn't know that existed, but you learn something new every day.

He was very good at it. He was working at a company in Boston, Massachusetts. I forget the name of the company. It's the Font Bureau, the Font Bureau, Inc. And the defendant and him got to know each other sometime in 1999 or somewheres where the defendant convinced him to come and work for him because the defendant is also in that kind of work also, the competing type of work, creating certain fonts.

And what the defendant did allegedly in the complaint was that he promised -- or at least told the plaintiff he would become a partner and get 50 percent interest in the business -- in defendant's business. In exchange, he would like to have the plaintiff provide him

with the rights to the fonts that he created while in the Boston company, which he did under the allegations of the complaint -- and these are all allegations right, just, taken for what they are worth.

He transferred those interests in an agreement to the defendant, and I have it here. It was two agreements that were executed March 9, 2004. One is a sale and assignment of the type fonts, and the other is the employment agreement that was entered into by the plaintiff and the defendant.

While that relationship was going after March 9, 2004, things were moving along, the allegations are that the defendant continued to tell plaintiff that things were working well. He hadn't gotten a chance to figure out the partnership stuff or partnership agreement, getting the details down, and ultimately what happened was sometime in -- allegedly sometime in July -- on July 31 of 2013, the defendant told -- or at least -- yeah, told the plaintiff basically, "Stop it. I'm working on it. Stop harassing me."

And then on -- allegedly in the complaint paragraph 42, October 21, 2013, for the first time Hoefler, the defendant, explicitly reneged on his personal agreement to transfer 50 percent of HTF to Frere-Jones, the plaintiff. This lawsuit ensued.

Pretty much, I guess, round about what the facts are. I might have left some things out, but fill the blanks in if you want.

MR. NEWMAN: That's correct, your Honor.

THE COURT: So tell me now -- let's compartmentalize this. There are five causes of action. Let's do each one separately because I'd like to -- at least you'll know where you stand for each cause of action.

Let's do the first one, which is a breach of an oral contract for partnership.

MR. DE LARCO: Yes.

THE COURT: Let's do the first thing is the statute of limitations. Why should it be dismissed for statute of limitation purposes?

MR. DE LARCO: Yes, your Honor. There's really two issues here with statute of limitations with respect to the breach of contract. It's the accrual date and then there is tolling.

THE COURT: We know there is a six-year statute of limitations.

MR. DE LARCO: That's right, your Honor. Well, based on the documents that are before the Court, which is the assignment agreement and also the employment agreement and also the concession --

THE COURT: They are not suing on the assignment

agreement or employment agreement. They are suing on something separate. They are suing on an oral contract for partnership. They are not really talking about -- because I thought about that. I said are they suing on the employment agreement and the assignment agreement? And that's not being -- that's not being asserted here.

MR. DE LARCO: That's true, your Honor. First of all, there is no partnership claim in this lawsuit. It's clear that they didn't bring a claim for partnership, breach of partnership. We actually argued it in our papers and said that they failed to state a cause of action under New York State partnership law. Clearly, there is no evidence of any sharing of the losses and profits. They did not even address argument in our papers.

THE COURT: Right.

MR. DE LARCO: This case is a specific case about the defendant allegedly telling the plaintiff that he was going to give 50 percent of his own shares in the business.

THE COURT: I saw that and I thought perhaps you may be right about it not having the trappings of a partnership. You know, we all know from the bar review courses for partnership to form, you have to share the profits and losses, so to speak. Then there is a partnership law that says there.

I saw that, but what happens, interestingly

enough, when you look at the employment agreement versus the assignment agreement, the two agreements, the sale and assignment type fonts versus the employment agreement, you guys didn't prepare this, did you?

MR. DE LARCO: We did not.

THE COURT: You're lucky you didn't prepare this. Because a sale and assignment type fonts, I thought interestingly enough there is a merger clause in there saying that in paragraph 12, "This agreement constitutes the entire understanding between the parties and supersedes all previous agreements, promises, representations, and negotiations between the parties concerning the fonts."

And I thought, let me take a look at the employment agreement. It doesn't have the same commentary. It says in paragraph 19, merely the agreement may be amended in writing signed by TGFA and an officer of the company specifically authorized to this agreement. No merger clause.

So the question again I have is: All those promises that he made about the 50 percent, was that attached to the employment agreement?

MR. DE LARCO: It's not in there, your Honor.

THE COURT: It's not barred.

MR. DE LARCO: That's our parol evidence argument.

THE COURT: No. There is no merger clause. Where is the merger clause?

MR. DE LARCO: First of all, your Honor, if I can go back to the assignment agreement, then I'm going to address the breach of contract, statute of limitations. So maybe --

THE COURT: You didn't answer my question. Where is the merger clause?

MR. DE LARCO: There is no merger clause, your Honor, but it's not necessary to have a merger clause --

THE COURT: Why not?

MR. DE LARCO: -- in a document like this. Because the courts have specifically held that consideration as great as equity in a business is not something that has to be merged into this agreement.

THE COURT: We're at a pre-answer motion to dismiss. It's merely whether or not a cause of action has been stated. What you've just told me perhaps is more appropriate at a 3212 scenario rather than in this scenario because that's the difference. Because the cases you rely on, are they 3211 or 3212?

MR. DE LARCO: They are 3211 and 3212, Judge.

THE COURT: Well, 3212s don't really apply very far.

MR. DE LARCO: Right. There are 3211 cases. And

if I may, your Honor, the plaintiff claims that the consideration for the shares in the business --

THE COURT: Before we go down this road, let's not go too far.

MR. DE LARCO: Okay.

THE COURT: Let's talk about the statute of limitation first.

MR. DE LARCO: Right.

THE COURT: Because we're talking about -- you're focusing more on stating the cause of action.

MR. DE LARCO: Exactly.

THE COURT: Let's talk about the statute of limitation. When did it accrue?

MR. DE LARCO: It accrued in 2004, your Honor. At that time the plaintiff admits that he met his end of the bargain. He claims that he turned over which he values -- which we dispute -- $3 million in fonts to my client, along with his name and his reputation.

THE COURT: Right.

MR. DE LARCO: At that time, your Honor --

THE COURT: He also moved. He left the company. He left the company, right, in Boston?

MR. DE LARCO: Right, which he did previously. In 1999 he did that. At that time, your Honor, in 2004 he had met his end of the bargain. He had a right to demand

performance from my client at that time, which he actually did.

THE COURT: Demand performance of turning over the 50 percent?

MR. DE LARCO: That's correct.

THE COURT: What do you think about all the emails that were going back and forth and the instant messages that he relies on that basically say, you know, "I'm working on it. I'm working on it."

He's got all these emails. There is ton of emails, and this is where the parol evidence comes into play. Because a ton of emails all happening before -- first of all, they happened before March of 2004. Because a lot of the emails were in 2000, 2001. They were all before 2004, going into this agreement. Which if you had a merger clause, all that would be out but it's not because you don't have a merger clause.

And then you have emails that postdate 2004, and then you have an instant message at the end saying -- basically it reads all this stuff saying -- oh, and he -- actually, the defendant is the one who started that instant messaging. It wasn't the plaintiff starting it. The defendant started it.

If I recall he says, "Hi ho, are you here?"

And then he responds by saying, "Hey, there,"

leaving in a bit, though. And he goes on.

So this wasn't even started by the plaintiff. The defendant initiated that instant message. So that --

MR. DE LARCO: Judge, that goes to tolling. All the emails and this text message goes to tolling, and that's what the general obligations are.

THE COURT: Tolling or estoppel.

MR. DE LARCO: Well, can I address tolling first or would you like me to address estoppel?

THE COURT: You can do whatever you want.

MR. DE LARCO: Okay. It all goes to tolling. The general obligations, your Honor, specifically states that an oral agreement cannot be tolled nor can it --

THE COURT: You're talking about 17-701.

MR. DE LARCO: That's correct. Nor can it be renewed unless there is a written acknowledgment from the debtor acknowledging the debt. Nowhere in any of those emails does my client acknowledge that he owed 50 percent shares in the business to the defendant.

THE COURT: Well, I'm not so sure I agree with you because the instant message kind of talks about it, saying, "Second thing, I'm going to have some things for you on the bigger stakes in the company conversation."

Well, what conversation was it, first of all, is what came to mind.

"If you don't mind, I think I'm going to type these up and send them to you for your perusal rather than putting you on the spot at a lunch. That way you'll have time to digest discuss and react."

So what was the conversation that the defendant had with the plaintiff?

MR. DE LARCO: Well, Judge, if there was already an agreement that he owed him 50 percent shares in the business, there is no conversation to be had about that.

THE COURT: How do we know that?

MR. DE LARCO: There's nowhere in this -- nowhere in this text message nor in any of the emails does he acknowledge that he owes him 50 percent shares, and that's what the general obligation law requires. It's a requirement.

THE COURT: The general obligation law requires a written acknowledgment.

MR. DE LARCO: Right.

THE COURT: And the way I look at it is the argument could be made that that paragraph that I just read into the record, then he says, "I might need a few more days than expected, though. I'm shooting for July 31. We are now in that everyone you need is out on their boat part of the year. I'll know more on Monday."

Then he goes on to say, "No, sorry, I'm still

putting everything together and had hoped to have something to give you next week, but I'm waiting for a guy who I think is now away or at least is not returning calls, which is odd since I met with him last Tuesday. I'd like to get you something as soon as possible and then we can talk about it whenever you had a chance to think about it."

My question to you is: Does Mr. Hoefler give me an affidavit telling me or explaining this instant message? Do I have an affidavit from you?

MR. DE LARCO: He did not, your Honor, because it's plain language that this is not an acknowledgment of debt.

THE COURT: That's fine. Did I have an affidavit from him explaining this? What is the conversation he had with the plaintiff?

MR. DE LARCO: I did not. We did not submit an affidavit.

THE COURT: I looked for it. I didn't see it. I read everything last night. So that's the problem with this tolling thing is that whether or not this amounts to a 17-701 acknowledgment. And you're saying it doesn't.

MR. DE LARCO: It doesn't.

THE COURT: But I'm not so sure. It doesn't say, "By the way, I've never agreed to 50 percent of giving you my shares. End of story. Period."

That would clearly tell me. Instead you got all these other buzz words in there.

MR. DE LARCO: But they are nothing but buzz words, your Honor. There is no acknowledgment of the debt.

THE COURT: That becomes a factual issue, correct?

MR. DE LARCO: It doesn't become a factual issue because the general obligation of law requires a written acknowledgment. There is no acknowledgment in this document or any of the other emails.

And by the way, your Honor, the emails talk about partner. There are vague references to partner. Number one, there is no partnership claim here. And number two, we all know that partners don't always own equity. There's a lot of law firms that have partners that aren't equity owners.

THE COURT: First of all, this is not a law firm, and second of all, every day is a new day in the business world. There is nothing new about that.

So let me ask counsel, then, your response to 17-701. He says that this IM -- this instant message is not what it purports to be, an acknowledgment.

MR. NEWMAN: Thank you, Justice Oing. This is a red herring. 17-101.

THE COURT: 17-701.

MR. NEWMAN: 17 --

THE COURT: 101 or 701?

MR. NEWMAN: That section is not relevant. In that section, as we put it and Karen wrote in her brief, that section was enacted to codify, to clarify common law when there was a debt as in "I owe Mike $10," right?

That and then the statute of limitation runs and you say, "Well, the statute of limitation's over but he owes me the money."

So if there is a repeat of the debt, "Yes, I owe you $10," that's what's relevant here.

THE COURT: This is not a debt.

MR. NEWMAN: No. It's essentially not the debt that's talking about in that general obligations law, and it's perfectly clear from the cases that we cite, including the Appellate Division case, Fourth Department, but it's Appellate Division, "Received your letter this morning. Very sorry. The condition of things for both yourself and myself shall be in within a few days to see you."

It's on page 16 of our brief.

THE COURT: All right.

MR. NEWMAN: There is no "I owe you $10" in there. It is a -- now, you're 100 percent right, your Honor. It's great to say that. I don't usually have the chance.

You're 100 percent right. The instant message and all the other evidence is at this point -- because they are allegations, right? We have to prove them.

THE COURT: Right.

MR. NEWMAN: But the instant message says you're going to get -- we're going to talk about a bigger stake in the company. There is zero way that that cannot be thought in some sense to include the promised 50 percent. And at this point in the proceedings, this is a pre-answer motion.

THE COURT: Right.

MR. NEWMAN: And all we have to show is that there is any cognizable theory at all that supports our facts. They have to conclusively establish a defense without doubt. And I submit to your Honor for the reading that you have presented is exactly right. It's a factual issue. It's a factual issue and a factual issue can't be determined on a motion to dismiss.

THE COURT: Okay. This is my response with respect to the defendant's argument that there is a holding under the general obligations law, Section 17-701. I find that if 17-701 is applicable that the instant message that we're looking at here qualifies as an acknowledgment -- at least at this juncture qualifies as an acknowledgment in writing of the 50 percent that is allegedly due and owing to the plaintiff.

The problem with that argument that defendants raise and I pointedly ask them, I don't have an affidavit from defendant himself explaining to me what that conversation was that he had with the plaintiff. It would have been very interesting to hear him say, "We never had -- during my conversations were strictly related to the employment of the plaintiff. We never talked about -- we never even talked about the 50 percent," and so forth. Nor is there any documentary proof to back up that there was no such conversations.

We have here a factual issue that's being raised here with respect to this instance messages and all the emails that are being run around here, and the fact of the matter is that the employment agreement doesn't have a merger clause.

So all the emails come in and start to at least explain whether or not that employment agreement does encompass also the 50 percent. I mean, I think defendant's right. There is no partnership allegations here sufficient, but the question then becomes is whether or not that 50 percent promise or alleged promise in the company running in favor of the plaintiff was actually made actionable.

So under those circumstances, I find 17-701 applicable and I find that the instant message that I have

in front of me right now constitutes an acknowledgment for the purposes of 3211. Whether we go forward on summary judgment, that does not however mean that the plaintiff is going to prevail at summary judgment stage, but at this point it's sufficient to get over that first hurdle.

I'd like to talk about the estoppel now, the other argument about the estoppel. Why don't you estop them from making the argument that the statute of limitation has not run -- started running yet?

MR. DE LARCO: Because, your Honor, the only allegations on the estoppel argument is that my client allegedly continuously acknowledged his promise. Three cases that we cited in our brief the courts have held that a mere acknowledgment of the alleged debt is not enough for an estoppel argument. Just saying I acknowledge, I acknowledge, I acknowledge --

THE COURT: You're saying -- the way you're focusing it is you're saying it's an alleged debt. It's not essentially an alleged debt. What it is a promise of a 50 percent interest in the company. It's not a debt in the traditional sense where you owe them money. This is something else in terms of equity interest, and it has less to do with debt and more with a condition of a deal. Because if that were the case, every single case I have in here is not -- is a debt and I would think that the

plaintiffs in those cases are going to argue it's not a debt. They owe me X amount of interest in the company. That's not a debt. That's an equity value.

MR. DE LARCO: An equity value is akin to a monetary value because it's worth something. So if somebody painted a house and they were supposed to get paid $100 --

THE COURT: A debt is a fixed number.

MR. DE LARCO: Something owed.

THE COURT: Some known figure. An equity interest is -- why you get equity interest is it's not fixed. It can go -- the sky's the limit in terms of your return on that equity. So that's why it's not a debt. You can't put a finger on it. That's the way I look at it.

MR. DE LARCO: Your Honor, on the equitable estoppel, the allegations are that my client just merely acknowledged his obligations. That's not enough under the law to estop us from asserting the statute of limitations.

THE COURT: You're absolutely right about that. But he just didn't send one email, he sent several emails. I mean, this guy couldn't help himself, allegedly. I'm not saying these are all allocations.

MR. DE LARCO: Those emails vaguely say "partner." They don't acknowledge anything. And, frankly, they have a duty of inquiry under fraud and under equitable

estoppel. No person in their right mind who turns over $3 million allegedly in the value of fonts waits nine and a half years to bring a lawsuit. They had a duty of inquiry when my client allegedly did not provide him with the 50 percent shares in the business to investigate, to inquire.

THE COURT: This goes into the heart of the relationship, then, as to what was done during the relationship to actually cause the plaintiff to wait this long. He makes the allegation that he continued to press the defendant to the point where defendant finally said to him, "Stop it. Stop harassing me. I'm working on it." That's what he says or that's what he alleges that the defendant responded to, and then subsequent to that July 31, 2013, commentary, in October 2013 defendant says, "Get lost. I'm not dealing with you anymore."

So that -- it's not as if I didn't have -- I mean, the allegations are there. You're asking me to ignore those allegations.

MR. DE LARCO: It's nine and a half years later. It's an objective standard, Judge. You have the legal right to look at this and say, "Would any reasonable person who was a Yale professor who had entered into a" --

THE COURT: That speaks volumes in itself.

MR. DE LARCO: -- "who had experience in entering

into assigning -- assignment agreements and licensing agreements in the past, who turns over $3 million allegedly in value fonts, whether that person would just sit around and accept that for nine and a half years?" It's unreasonable.

THE COURT: Well, you may say it's unreasonable, but at this point this is a pre-answer stage and, again, not that this would -- you know, I kind of understand why you wouldn't tender or proffer an affidavit from the defendant because that would raise a factual --

MR. DE LARCO: It's a motion to dismiss.

THE COURT: You wouldn't do that because that's exactly what the plaintiff has done. I'm allowed to look at the plaintiff's affidavit to flesh out the complaint because it's not a verified complaint. Fortunately, he gave me an affidavit. That kind of laid out everything. And I take it for what it says in terms of face value, what he is saying. So nine years went by. He is working there. He is getting paid. I don't know what the circumstances are.

And when you say you got the cases, do you have the case right there? What's the case that you're relying on that says estoppel?

MR. DE LARCO: There is Gutkin versus Siegal.

THE COURT: Hang on a second. Gutkin versus

Siegal. This is a 85 AD3d 687, First Department, okay. G-U-T-K-I-N.

MR. DE LARCO: I'm sorry, your Honor. I -- I -- it's the wrong case. There is three cases. There is Donahue-Halverson --

THE COURT: Just give me one.

MR. DE LARCO: I'm sorry.

THE COURT: Donahue?

MR. DE LARCO: Yes. Donahue-Halverson, which is --

THE COURT: Hold on a second. My fingers don't move that fast. Donahue versus Halverson. Let me look at that. That's 95 AD2d 953, Third Department, 1983.

Let's see. Well, this was before emails took place, okay. Well, this case says -- Donahue says, interestingly enough, in 1983 before emails were prevailing, the Third Department said, "The single instance in 1979 of a vague assurance that defendant would review the two accounts and any offsetting credits and would then pay plaintiff for the amount properly owed does not reflect such conduct as would support an equitable estoppel."

I don't think we have a single instance here. There was no single instance email. It was a series of emails.

MR. DE LARCO: But, Judge, those emails -- those

emails show --

THE COURT: How do you respond to that? This is a single instance.

MR. DE LARCO: No. This is about an assurance of the promise.

THE COURT: No, no, no. This says -- the Court said no equitable estoppel because there was a single instance in 1979 of a vague assurance. They said that's not enough.

Do you have another case?

MR. DE LARCO: Yes, I do. Dialcom versus AT&T.

THE COURT: Which one?

MR. DE LARCO: Dialcom.

THE COURT: Hang on a second. That one I don't have.

What's the other one? Unless you have it in front of you.

MR. DE LARCO: I do have a copy, Judge. May I approach?

THE COURT: Yes. Dialcom, D-I-A-L-C-O-M, versus AT&T, Kings County Supreme Court, 2004, Westlaw, 5825128.

Okay. "It's well settled that a mere promise to pay and/or to otherwise perform under an agreement is insufficient to warrant the invoking of the doctrine of equitable estoppel, particularly whereas here, the claimed

assurance of future performance is supported by only a single vague communication that a review would be conducted and plaintiff paid any amounts properly owed."

Well --

MR. DE LARCO: Once again, it's an oral assurance.

THE COURT: But you're missing the single assurance part. You're focusing on the -- what was given but you're missing the fact that there was only a single assurance.

Unless I'm reading this wrong, I don't have a single email. I have a series of emails plus an instant message.

MR. DE LARCO: But those emails don't assure anything, Judge.

THE COURT: Okay.

MR. DE LARCO: Those emails don't assure anything. All they do is -- my client vaguely refers to Mr. Frere-Jones as his partner when he's referring -- when he is speaking to clients.

THE COURT: I'm glad you mentioned that for the record. I think that's pretty hard to have that kind of statement in an email.

But have a seat. Your response to the equitable estoppel argument here, I don't think there is a single

assurance. I think there is a series of commentary going back and forth.

MR. NEWMAN: Your Honor, I have very little to say on this point because it's totally clear from our allegations -- they are allegations -- but it's totally clear from our complaint in the affidavit that there were dozens, hundreds. You cannot say, "You and I are partners," to your clients, to each other --

THE COURT: To the whole world.

MR. NEWMAN: -- to your employees, to the whole world, to the New York Times, to the people who did a movie about him, to New York Magazine, you can't -- by the way, to Martha Stewart, your friends.

THE COURT: Thank you for reminding me.

MR. NEWMAN: They had -- he --

THE COURT: Trust me, this will not be a 63-page decision.

MR. NEWMAN: Thank you. He had two fonts he did for Martha Stewart.

THE COURT: Here's the other funny thing. To lend credence to that argument here, you have -- if this was all accurate in terms of what defense counsel is saying that there was never a deal, this is a pie in the sky, a figment of plaintiff's imagination, then why on January 17, 2014, did you have a press release saying as follows:

"Last week designer, Tobias Frere-Jones, a long-time employee of the Hoefler Type Foundry, Inc., decided to leave the company with Tobias's part of the company founded by Jonathan Hoefler in 1989" to become known as Hoefler and Company -- "Last week designer, Tobias Frere-Jones, a long-time employee of the Hoefler Type Foundry, Inc., doing business as Hoefler & Frere-Jones, decided to leave the company. With Tobias's departure, the company founded by Jonathan Hoefler in 1989 would become known as Hoefler & Company."

And it goes on and talks about Tobias filing a claim, and the last paragraph -- well, I'll just read it. "Following his departure, Tobias filed a claim against company founder, Jonathan Hoefler. His allegations are not the facts and they profoundly misrepresent Tobias's relationship with both the company and Jonathan. Whether as Hoefler Type Foundry, Hoefler & Frere-Jones, or Hoefler & Company, our company has always been a great place for designers which is why it's always been and will continue to be a great place for design. It goes without saying that all of us are disappointed by Tobias's actions. The company will vigorously defend itself against these allegations, which are false and without legal merit. In the meantime, we're all hard at work continuing to create the kinds of typefaces that designers have come to expect

from us for more than 25 years."

I don't know. That kind of press release kind of lends some credence to -- take away from the arguments that defense counsel is putting before me.

Why would you give me an affidavit of such a press release?

MR. DE LARCO: Your Honor, if -- this case has been highly publicized in the press in many different ways.

THE COURT: As opposed to other cases that I have?

MR. DE LARCO: Right. This is a press release. Every individual who is blamed for doing something has a right to issue a press release.

THE COURT: But that --

MR. DE LARCO: All that does, your Honor, is deny the allegations in the complaint.

THE COURT: That press release does more than that. That press release also says doing business as Hoefler & Frere-Jones.

MR. DE LARCO: Nobody's going to deny the business was at one time Hoefler & Frere-Jones, and the consideration for the business going to Hoefler & Frere-Jones, your Honor, goes into the employment agreement. And, in fact, the employment agreement says he's going to turn over his name and his reputation in

consideration for the consideration in that employment agreement, which was guaranteed --

THE COURT: Plus.

MR. DE LARCO: -- which was guaranteed employment.

THE COURT: Plus, without the merger clause, the 50 percent commentary.

MR. DE LARCO: May I address that, your Honor?

THE COURT: Just one second. So that -- I want to finish this off first before -- with respect to the estoppel argument.

All right. Having the heard the arguments today, my position is with respect to the estoppel argument, plaintiff has set forth sufficient facts and arguments that there is an estoppel in effect with respect to what has occurred in this case so that the statute of limitations did not run as of sometime in March of 2004 but was tolled equitably by way of estoppel as well as by under the general obligations law so that we have at least until July 31, 2013, when plaintiff was advised -- when defendant advised plaintiff to, "Stop it. I'm working on it. Stop harassing me," and then three months later in October 2013 telling the plaintiff, "Good-bye. I don't want to deal with you anymore. That's the end of it."

That's the period of time that the -- in which

the statute of limitations starts to run, so that under the circumstances here, there has been no statute of limitations problem with respect to plaintiff's claim for the first cause of action, and that's also looking at all the various emails that are in the record here, as well as the instant message that I have in front of me, as well as this press release that I have in front of me today. So that's it.

So, therefore, the argument of dismissing the first cause of action for statute of limitation purposes is denied. These arguments that we have here go and are equally applicable for all the remaining four causes of action because the equitable estoppel argument is ripe for while there may not be a 17-701 argument for a lot of the other remaining -- for the remaining causes of action of promissory estoppel, the declaration of constructive trust, unjust enrichment, and fraud, the estoppel argument is applicable to all of them, and we don't need to rehash the arguments there.

So my finding is with respect to those remaining four causes of action, the defendant is equitably estopped, and the time period from which the clock starts ticking for those four causes of action is at the earliest July 31, 2013, and at the latest October 2013. This action, just for the record, was commenced on January 16, 2014, and as a

result, all of those -- all these five causes of action are timely commenced.

What's your next argument? With failing to state a cause of action now?

MR. DE LARCO: Yes, your Honor. With respect to our equitable -- our parol evidence doctrine argument. If your Honor takes a look at the sale and assignment of type fonts, it's clear from what the plaintiff is alleging that there are two significant pieces of consideration that he was to give my client and the company in order to get the 50 percent shares in the business.

Number one, which he claims is the most valuable which is the $3 million in fonts, that was assigned in the sale and assignment of type fonts agreement which was executed by the parties on March 9, 2004.

THE COURT: Right.

MR. DE LARCO: There is a merger clause in there, your Honor.

THE COURT: Right.

MR. DE LARCO: Which merges any prior oral promises which would include allegedly the equity.

THE COURT: Well, that's your --

MR. DE LARCO: Therefore, there is no consideration for the equity if it's merged into this agreement, and the equity was for $10. It has absolutely

no -- there's no writings and there's no language in here that says "equity shares" or "partnership."

THE COURT: I've seen agreements like this where you transfer -- property transfer interest for nominal sums, for $10. So that although you're saying $10 is not fair consideration, the way I look at it, that's the agreement they have signed off on. $10. I've seen agreements where they have transferred billion-dollar real estate on consideration for $10 as nominal consideration. I've seen this. The fact that this is for $10, that doesn't fly very far.

The question I have: You're saying that the sale and assignment type font must necessarily include the 50 percent interest in the company --

MR. DE LARCO: That's correct.

THE COURT: -- and there is a merger clause in here, therefore, Judge, it's out.

But the question is: Why isn't -- why could not the 50 percent be included in the employment agreement?

MR. DE LARCO: Because then he wouldn't have given the company the full consideration.

And, Judge, the employment agreement, the fonts were in one agreement. The employment agreement has the two other pieces of consideration, which was allegedly giving his name and reputation to the company. That is in

the employment agreement.

Your Honor, the fact that there is an integration clause, it is not legally that sufficient. What's sufficient here is he admits that the consideration that he was to give the company is all set forth in these two agreements. Nowhere in any of these agreements does it say in consideration for you giving me the fonts, your name, your reputation, and your skills, am I going to give you my shares in the business. It doesn't say that.

THE COURT: You are right. It doesn't say that.

MR. DE LARCO: But basically what they are trying to do is supplement these two agreements, which is barred by the parol evidence doctrine.

THE COURT: No. The parol evidence doesn't apply to the employment agreement. Why would it apply to the employment agreement?

MR. DE LARCO: Because the consideration that he allegedly gave my client is set forth in the employment agreement. My client doesn't say anywhere in this agreement that he was to give him shares. Instead he gave him guaranteed employment.

THE COURT: Where does it say that in the employment agreement?

MR. DE LARCO: I'm sorry?

THE COURT: Where does it state that in the -

what you just said to me, where does it state that specifically?

MR. DE LARCO: That he was not to give him equity?

THE COURT: Yes.

MR. DE LARCO: It doesn't say it. And if that was the deal, it would be in writing. He's trying to -- they are trying to supplement --

THE COURT: My question is: What came first, the chicken or the egg? We can sit here all day and argue about this. Unfortunately for you it's my ruling that counts.

The way I look at this employment agreement, it doesn't say what you just said specifically. It has no merger clause in here, unlike the sale and assignment agreement. So that the question then becomes is: Because it doesn't say it, does it mean it doesn't exist?

MR. DE LARCO: Your Honor, that's what the parol evidence doctrine is to bar.

THE COURT: The parol evidence rule provides or bars any information to vary the terms of an agreement. Right? We all know that, correct?

So that the question then becomes is: Because there is no merger clause here, the parol evidence rule doesn't apply. What happens is now the terms of the

agreement may be varied because he's saying under the employment -- well, he's saying that -- whatever he's saying. Ultimately, he said he was promised 50 percent.

So you're saying that, well, Judge, if you look at the sale and assignment, there is a merger clause there. So, therefore, no 50 percent here. And by virtue of them being signed at the same time, this also says there is no 50 percent here, so there is no promise.

That's -- you're using belts and suspenders to do that kind of argument.

MR. DE LARCO: But, Judge, the consideration as set forth in this agreement as specifically says --

THE COURT: Which agreement?

MR. DE LARCO: In the employment agreement.

If you look at -- if you look at -- your Honor, if you look at page 6 of the employment agreement, the top paragraph, it says, "TFJ hereby agrees to the use and name and likeness in the identification of the company."

THE COURT: Hang on a second. Page 6.

MR. DE LARCO: Yep, the very top paragraph.

THE COURT: Okay.

MR. DE LARCO: And the second sentence says, "For consideration received, TFJ agrees that the company shall own all rights and title to the changed name and may, but shall not be required to, amend the company title to

reflect the changed name, use the changed name as a d/b/a, and shall be further entitled to register any copyright or trademark in connection therewith."

This is the two additional pieces of consideration that he claims that he gave my client, and it says specifically right there "for consideration received." And the consideration received is the consideration that is set forth in this document.

THE COURT: What document?

MR. DE LARCO: In the employment agreement which is the guaranteed employment at a certain salary for two years and severance if he's terminated at any time thereafter for cause, plus a bonus.

THE COURT: Okay. I'm not disagreeing with you. But "for consideration received," you are right about that in terms it says the employment agreement says set forth or at least set out in this agreement. I'm not disagreeing with you.

But then the question becomes is -- he's alleging in his complaint that there was more to this than what this agreement says. That's what he is saying.

My only question is: Why shouldn't I give him the benefit to go forward with that and have him prove that? Because he's got to prove it.

MR. DE LARCO: Because that's what the parol

evidence rule bars. He's trying to supplement this agreement, Judge. He is trying to say that there was more consideration than what was set forth in these two agreements.

THE COURT: We're going around in circles. I can't get it through you, you can't get it through me, that the rule doesn't apply here because I don't have a merger clause. That's the bottom line.

Are you going to tell me right now that if -- is it your position that because there is no merger clause in this employment agreement, the parol evidence rule still applies and that outside extrinsic evidence cannot come in? Is that your position?

MR. DE LARCO: That is our position, your Honor.

THE COURT: That's not the law, though. Because if you have no merger clause, why shouldn't I allow parol evidence in?

If you got a case that says -- right now give me a case that says when you do a contract interpretation, no merger clause exists, therefore parol evidence rule applies still. You got a case that says that? I don't think so because I did a quick look.

MR. DE LARCO: Rodin, your Honor?

THE COURT: Give me the case. I'll take a look at it. So far you're 0 for 2. Hopefully you'll get 1 for

3 on this one. (Perusing.)

All right. Braten versus Bankers -- B-R-A-T-E-N, versus Bankers Trust, 60 NY2d 155-1983.

Okay. First, it's a summary judgment, not a 3211.

Interesting. It says right here -- let's see. Hang on a second. There was an issue about the guarantee in that case. "The 'Guaranty' is a complete written instrument. In the absence of a merger clause," such as what we have here in the employment agreement, "the court must determine whether or not there is an integration 'by reading the writing in the light of surrounding circumstances, and by determining whether or not the agreement was one which the parties would ordinarily be expected to embody in the writing. Both a reading of the 'Guaranty' and a consideration of the surrounding circumstances lead to the conclusion that the "Guaranty' is a complete written instrument. The 'Guaranty' recites that it is given 'in consideration of financial accommodations given, or to be given or continued' to BAC."

(Discussion held off the record.)

THE COURT: "The 'Guaranty' recites that it is given 'in consideration of financial accommodations given, or to be given or continued' to BAC," all caps. "There is no mention of a promise to forbear until September 30 in

this clause, dealing with the very subject matter, or in any other part of the 'Guaranty.' The parties and their counsel negotiated during a two-month period, resulting in a specially drawn document executed by Klinemans," K-L-I-N-E-M-A-N-S. "Such a fundamental condition would hardly have been omitted."

So that in that case when they said that with the guaranty, they did look at surrounding circumstances to arrive at their decision because there was no merger clause. That's what it says.

MR. DE LARCO: And your Honor -- right. And the surrounding circumstances in our case are the two agreements that were simultaneously executed on the same day, one which has a merger clause involved.

THE COURT: Okay. That's your position. That's fine. I disagree with that.

Your response, Counsel?

MR. NEWMAN: Your Honor, I have basically no response on the parol evidence argument because he's wrong and there is nothing I can say about it other than he's wrong. There is no merger clause and he's wrong.

Now, the point I wanted to address is -- which we haven't talked about yet, the point -- the agreements were not with the defendant. The agreements were between Frere-Jones and the company that Frere-Jones thought he

owned half of.

Now, when you have that circumstance, of course you're going to sign anything. Your Honor's seen hundreds of employment contracts. Many --

THE COURT: That was separate and apart from the two agreements that are written in terms of what he personally -- that's why he's being sued personally, that he allegedly promised to the plaintiff.

MR. NEWMAN: That is correct. So these agreements don't even deal -- they are not even between the same, quote, parties. So, I mean, you know, we're grasping around here --

THE COURT: I'm not grasping at anything, okay.

MR. NEWMAN: Not you. I'm sorry. I have nothing else to say.

THE COURT: That's okay.

Your response?

MR. DE LARCO: Yes, your Honor. The parol evidence rule specifically says that it applies to parties to a contract in the privity. Obviously, Mr. Hoefler was in privity with the company. He was the sole shareholder and the president of the company. If I may, your Honor --

THE COURT: He's being sued personally, though.

MR. DE LARCO: But they can't have it both ways.

THE COURT: Okay.

MR. DE LARCO: Because this -- and this is why. They claim that those contracts, he isn't a third-party beneficiary to those contracts and is not in privity with the company. That's their argument.

Well, if that's the case, then Mr. Hoefler has got no consideration for the alleged agreement because all the consideration went to the company. So, obviously, the company and Mr. Hoefler were in privity with each other. In contracts the parol evidence rules applies then to parties to a contract and their privities.

THE COURT: This is my decision and order with respect to that branch of the motion to dismiss. The first cause of action for an oral agreement, I'm going to deny that branch of the motion. I find that the allegations are sufficient to set forth a cause of action for a -- for the 50 percent, I guess, promise from defendant to plaintiff to provide him with 50 percent of the company.

There is sufficient proof in the record in terms of the affidavit by plaintiff in terms of what went on, what the transactions are. The parol evidence rule does not apply here because there is no merger clause with respect to the employment agreement. So we don't know exactly what was said in terms of what was that consideration.

And on top of that, as plaintiff counsel points

out, it's an employment agreement and assignment agreement that runs between the plaintiff and the company, not between the plaintiff and the individual defendant in this case.

Defense counsel said they can't have it both ways. Well, in this case here, the plaintiff is suing the individual defendant personally because of his interest or the amount of interest he holds in the company. It's his promise that went to the plaintiff in terms of what he gave him, the 50 percent. With respect to the employment agreement and the sale and assignment agreement, those are separate agreements that, even if they were applicable, they are separate in a sense that they deal with other issues and not particularly with this 50 percent.

And if we were to argue as we did prior to that, these two agreements when you read them together, there are still questions that arise particularly with the employment agreement and what else was promised to him, and I can't help but look at the emails as well as the instant messages that went before or between the two parties to flesh out what was exactly the fair consideration that was given for the employment agreement. Was it more than just the employment period of time as well as compensation? Was there other avenues or other areas discussed?

That's all to be fleshed out during discovery,

and perhaps at the summary judgment phase the defendant may prevail. But at this stage for pre-answer motion to dismiss, my finding is that the first cause of action is sufficiently pleaded.

I note that the cases relied on by defense counsel, in particular the court of appeals case that I just recently cited, doesn't say that when there is no merger clause, that parol evidence rule applies. That's not what the Court says. The Court says no merger clause, you look at the surrounding circumstances to flesh out the agreement, and that's what I am doing here.

So under these circumstances, that branch of the motion to dismiss the first cause of action is denied.

Let's turn now to the promissory estoppel cause of action. Why should I dismiss that claim as failing to state a cause of action?

MR. DE LARCO: Your Honor, the promissory estoppel claim just rides the shirt tail breach of contract claim. So we reassert our arguments with respect to that claim.

THE COURT: Right. Because for the estoppel -- hang on a second. Let me get to my notes here. Hold on one second. Okay.

For an estoppel, it's a promise that is sufficiently clear and unambiguous, reasonable reliance on

the promise by a party and injury caused by the reliance. And I'm citing MatlinPatterson, M-A-T-L-I-N-P-A-T-T-E-R-S-O-N, versus Federal Express, 87 AD3d 836, First Department, 2011.

Simply, whether or not it's sufficiently alleged the facts that would support that claim. And here defendant allegedly orally promised to give 50 percent of the equity in HTF to plaintiff. That's clear and unambiguous. That's the allegation. Whether he proves it or not is another story, right?

And I think at this point I think he's sufficiently stated a cause of action for that because we went through -- we went the whole nine yards with respect to the oral contract, and I think all those arguments and all the back and forth we did, I think, are equally applicable to the promissory estoppel argument.

Any response?

MR. NEWMAN: No, sir.

THE COURT: Okay. So under those circumstances, that branch of the motion to dismiss the promissory estoppel cause of action is denied.

Turning now to the constructive trust. A confidential or fiduciary relationship, a promise, transfer, and reliance upon the promise and unjust enrichment.

I don't know. Are you entitled to a constructive trust here? It seems like -- I'm not sure that's there.

MR. NEWMAN: I'm not sure it is either, your Honor. Given your rulings to date, I make it very simple. We would withdraw that claim.

THE COURT: Okay. So then that third cause of action for constructive trust is withdrawn.

MR. NEWMAN: Withdrawn.

THE COURT: Thank you.

Unjust enrichment now. That goes to the plaintiff must show that the other party was enriched at plaintiff's expense and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.

That's essentially an alternative argument. You know, in case their breach of contract falls, they have got this. I mean, that's subject to summary judgment later on.

I mean, what's your response to that?

MR. DE LARCO: Once again, it rides the shirt tails of the breach of contract claim, your Honor.

THE COURT: Right, right. So do you have anything?

MR. NEWMAN: No, sir.

THE COURT: So what I want to look at is that with respect to the unjust enrichment, that's going to

dovetail -- that's going to be part and parcel of whether or not the breach of contract rises to the summary judgment phase where we're going to see where this goes, and at this point I believe the complete record that I have; namely, the complaint with the affidavit, is sufficient for me to say that an allegation has been sufficiently made with respect to the unjust enrichment claim, and, accordingly, that branch of the motion to dismiss the fourth cause of action for unjust enrichment is denied as it stands.

Here. The fraud claim, why should I dismiss the fraud claim?

MR. DE LARCO: Well, your Honor, for a couple of reasons. First of all, the statute of limitations I believe we discussed.

THE COURT: I already said they are all in.

MR. DE LARCO: I understand. Secondly, you can't bring a fraud claim that just basically rehash a breach of contract claim, which is exactly what they did.

THE COURT: I thought about that. You are right about that.

MR. DE LARCO: The allegations are identical.

THE COURT: Except for paragraph 72. "Upon information and belief," and I agree with you. You are right. You can't just bootstrap a fraud claim on top of a contract claim. And I looked very carefully and

paragraph 72 said something very interesting, which is not often pleaded or alleged. "Upon information and belief on many occasions that Hoefler made false representations and promises to Frere-Jones. He intended to and did dupe Frere-Jones into thinking that there was an equal partnership in order to induce Frere-Jones to transfer the Dowry Fonts and cause Frere-Jones to resign from Font Bureau, relocate to New York, and contribute his name, reputation, industry connections, and design authority to HTF."

Paragraph 73, "Frere-Jones was justified in relying on Hoefler's representation and promises."

Paragraph 74, "Frere-Jones has suffered damage at Hoefler's fraud" -- "from Hoefler's fraud in an amount to be determined at trial but not less than $20 million."

Those three allegations are exactly -- because the question is: When those representations were made were they false?

He says they were. He alleges that they were.

MR. DE LARCO: He alleges that they were made before the -- from 1999 all the way up to 2004, which is the same allegations that he makes in connection with his breach of contract, his promissory estoppel, and his equitable estoppel claims.

THE COURT: Yes.

MR. DE LARCO: This is no different than what he alleges with respect to those claims, your Honor.

THE COURT: Exactly. You're right. Except that he says the time they were made -- and this is critical, this is critical. This is saying it's the scienter portion that you're thinking about when a fraud claim is asserted, and at this point the scienter portion is that at the time he made it, he intended to and did dupe plaintiff into thinking that there was an equal partnership.

MR. DE LARCO: But, your Honor, that was in 1999. That's when the oral agreement allegedly took place. His allegations are for all the misrepresentations started at that time. That's the exact same facts and circumstances as the breach of contract, the promissory estoppel, and probably not the unjust enrichment because the fonts weren't turned over until 2004.

THE COURT: Okay. And do you have a response to that?

MR. NEWMAN: Basically, this is at the pleading stage. It's permissible to allege claims in the alternative and --

THE COURT: Not if the fraud is a bootstrap of the breach of contract.

MR. NEWMAN: Well, with respect, your Honor, it's not a bootstrap. The allegation is that at the time

Mr. Hoefler induced --

THE COURT: In 1999?

MR. NEWMAN: Right -- to come in, to leave his job in Boston, to leave the Font Bureau, to transfer all his millions of dollars worth of fonts, and come to work in New York and build this Hoefler & Frere-Jones empire, which they did, he never intended to keep it and that's the allegation. That's --

THE COURT: That's my problem. He has that allegation paragraph 72. I oftentimes do not see that specific kind of allegation, which I always, without hesitation, drop the fraud claim. I can't in the sense that I have from 1999 or throughout the proceedings that all the commentary he made comes back to this paragraph 72 which says -- which alleges, okay, that duped me, every time he sucker punches me, so that I don't know what to do at this point.

MR. DE LARCO: But his allegations are that my client -- his intent was not to honor the contractual obligations. That's what they are saying.

And in Fallon, the First Department case, the Court said, quote, "A mere allegation that defendant did not intend to honor its contractual obligations does not confer what was essentially a breach of contract action into an action for fraud."

THE COURT: Oh. The contract allegation being the 50 percent?

MR. DE LARCO: Correct.

THE COURT: I see.

Your response? Because ultimately it's the 50 percent we're talking about here, that your plaintiff -- that the plaintiff here has been sort of denied his -- denied allegedly the right to receive 50 percent. It's not any different in terms of what he is looking to get.

I mean, ultimately, the result is, "I want the 50 percent. You don't give me the 50 percent. I'm damaged for $20 million."

The fraud claim still rises or flows from that 50 percent. It's not something new or different that's from the contract, and I think he might have a point there.

MR. NEWMAN: Your Honor, all I can say on that is it's not just in fraud. It's not just the 50 percent. It's everything that he did to -- in exchange. He should get his fonts back. He should get his name back. He should get his reputation back. He should get all the things that were damaged because of the fraud.

THE COURT: That's all arising out of the contractor, at least the alleged contract or oral contract between the parties here. I mean, it's no different. There is nothing extraneous. The relief that you're

seeking is not -- the relief that you're seeking doesn't seem to be extraneous from the contract or alleged contract that was entered into by the parties.

I mean, at the end of the day you can't just -- as defense counsel is saying, you can't just allege that he made a misrepresentation. Well, ultimately, Judge, he's getting what he wants under the contractual arguments. It's the same thing. There is nothing different.

All right. Okay. You know, the way I look at it is -- have a seat, Counsel.

This is my decision and order with respect to the motion to dismiss the fifth cause of action for fraud. I'm going to grant that motion. I'm going to dismiss the fraud cause of action. I will say this, that all the dismissals here are without prejudice, subject to whatever discovery goes on out there, and in the meantime, if discovery does provide facts or information that provides further allegations that you're going to need to support a fraud claim, you may seek leave from me to interpose another fraud claim or interpose a fraud claim.

But at this juncture, defense counsel is accurate in saying that, you know, it's duplicative of the breach of contract claim or the alleged oral contract claim, and I am in agreement with that.

So, accordingly, the fraud claim is out, but it's

without prejudice and that's my decision and order. Okay?

Counsel, you're the moving party. Please order the transcript. You're going to have to serve an answer.

What's remaining here is the first cause of action, the second cause of action, the fourth cause of action. So there are three causes of action that are remaining. You need to serve an answer to the complaint.

Today is July 22. How about serving an answer by August 19?

MR. DE LARCO: Yes, your Honor.

THE COURT: Okay. And I'm not -- and then since you're here, we might want to pick a date to do a PC conference so that we can all move things rather quickly.

So, Counsel, just order the transcript. I'll so order it. You'll have it for your records and we're done.

Off the record.

* * *

CERTIFIED TO BE A TRUE AND CORRECT
TRANSCRIPT OF THE FOREGOING PROCEEDINGS.

ANGELA TOLAS, OFFICIAL COURT REPORTER

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

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER,

Defendant.

Index No. 650139/2014

ANSWER OF DEFENDANT JONATHAN HOEFLER

Defendant Jonathan Hoefler ("Defendant"), by and through his attorneys, Hogan Lovells US LLP, as and for his Answer to the Complaint of Plaintiff Tobias Frere-Jones ("Plaintiff"), states as follows:

1. Defendant denies the allegations in Paragraph 1 of the Complaint.

2. Defendant denies the allegations in Paragraph 2 of the Complaint.

3. Paragraph 3 of the Complaint asserts legal conclusions to which no answer is required. To the extent an answer is required, Defendant denies the allegations in Paragraph 3 of the Complaint.

4. Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4, except admits that Plaintiff is a type designer, received the Gerrit Noordzij Prize in or around 2006, and received the AIGA medal in 2013, and avers that the AIGA medal was jointly awarded to Defendant.

5. Defendant denies the allegations in Paragraph 5 of the Complaint, except admits that he is a type designer and a businessman.

6. Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6.

7. Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7.

8. Defendant denies the allegations in Paragraph 8 of the Complaint, except admits that fonts are software.

9. Defendant denies the allegations in Paragraph 9 of the Complaint, except admits that he has owned and operated HTF, a New York corporation, since 1989.

10. Defendant denies the allegations in Paragraph 10 of the Complaint, except admits that he and Plaintiff were competitors, and later collaborators and friends.

11. Defendant denies the allegations in Paragraph 11 of the Complaint.

12. Defendant denies the allegations in Paragraph 12 of the Complaint.

13. Defendant denies the allegations in Paragraph 13 of the Complaint.

14. Defendant denies the allegations in Paragraph 14 of the Complaint.

15. Defendant denies the allegations in Paragraph 15 of the Complaint.

16. Defendant denies the allegations in Paragraph 16 of the Complaint.

17. Defendant denies the allegations in Paragraph 17 of the Complaint.

18. Defendant denies the allegations in Paragraph 18 of the Complaint.

19. Defendant denies the allegations in Paragraph 19 of the Complaint.

20. Defendant denies the allegations in Paragraph 20 of the Complaint and respectfully refers the Court to the referenced document for the full and accurate contents thereof.

21. Defendant denies the allegations in Paragraph 21 of the Complaint.

22. Defendant denies the allegations in Paragraph 22 of the Complaint.

23. Defendant denies the allegations in Paragraph 23 of the Complaint.

24. Defendant denies the allegations in Paragraph 24 of the Complaint.

25. Defendant denies the allegations in Paragraph 25 of the Complaint.

26. Defendant denies the allegations in Paragraph 26 of the Complaint, except admits that Plaintiff executed a Sale and Assignment of Type Fonts agreement ("Assignment Agreement") in March 2004. Defendant respectfully refers the Court to the Assignment Agreement for the full and accurate contents thereof.

27. Defendant denies the allegations in Paragraph 27 of the Complaint.

28. Defendant denies the allegations in Paragraph 28 of the Complaint.

29. Defendant denies the allegations in Paragraph 29 of the Complaint.

30. Defendant denies the allegations in Paragraph 30 of the Complaint.

31. Defendant denies the allegations in Paragraph 31 of the Complaint.

32. Defendant denies the allegations in Paragraph 32 of the Complaint.

33. Defendant denies the allegations in Paragraph 33 of the Complaint.

34. Defendant denies the allegations in Paragraph 34 of the Complaint.

35. Defendant denies the allegations in Paragraph 35 of the Complaint.

36. Defendant denies the allegations in Paragraph 36 of the Complaint, except admits that the Cloud offers its subscribers the ability to access and purchase fonts from the HTF type library in web page design, and avers that such fonts include fonts that Plaintiff worked on as an employee of HTF.

37. Defendant denies the allegations in Paragraph 37 of the Complaint.

38. Defendant denies the allegations in Paragraph 38 of the Complaint.

39. Defendant denies the allegations in Paragraph 39 of the Complaint, except admits that the Cloud launched on July 1, 2013.

40. Defendant denies the allegations in Paragraph 40 of the Complaint.

41. Defendant denies the allegations in Paragraph 41 of the Complaint.

42. Defendant denies the allegations in Paragraph 42 of the Complaint.

43. Defendant denies the allegations in Paragraph 43 of the Complaint.

44. In response to Paragraph 44 of the Complaint, Defendant repeats and realleges his response to Paragraphs 1 through 43 as if fully set forth herein.

45. Defendant denies the allegations in Paragraph 45 of the Complaint.

46. Defendant denies the allegations in Paragraph 46 of the Complaint.

47. Defendant denies the allegations in Paragraph 47 of the Complaint.

48. Defendant denies the allegations in Paragraph 48 of the Complaint.

49. Defendant denies the allegations in Paragraph 49 of the Complaint.

50. In response to Paragraph 50 of the Complaint, Defendant repeats and realleges his response to Paragraphs 1 through 49 as if fully set forth herein.

51. Defendant denies the allegations in Paragraph 51 of the Complaint.

52. Defendant denies the allegations in Paragraph 52 of the Complaint.

53. Defendant denies the allegations in Paragraph 53 of the Complaint.

54. Defendant denies the allegations in Paragraph 54 of the Complaint.

55. Defendant denies the allegations in Paragraph 55 of the Complaint.

56. Paragraph 56 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is

required, Defendant repeats and realleges his response to Paragraphs 1 through 55 as if fully set forth herein.

57. Paragraph 57 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 57.

58. Paragraph 58 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 58.

59. Paragraph 59 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 59.

60. Paragraph 60 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 60.

61. Paragraph 61 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 61.

62. Paragraph 62 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 62.

63. In response to Paragraph 63 of the Complaint, Defendant repeats and realleges his response to Paragraphs 1 through 62 as if fully set forth herein.

64. Defendant denies the allegations in Paragraph 64 of the Complaint.

65. Defendant denies the allegations in Paragraph 65 of the Complaint.

66. Defendant denies the allegations in Paragraph 66 of the Complaint.

67. Defendant denies the allegations in Paragraph 67 of the Complaint.

68. Paragraph 68 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant repeats and realleges his response to Paragraphs 1 through 67 as if fully set forth herein.

69. Paragraph 69 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 69.

70. Paragraph 70 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 70.

71. Paragraph 71 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 71.

72. Paragraph 72 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 72.

73. Paragraph 73 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 73.

74. Paragraph 74 of the Complaint concerns a Cause of Action that has been dismissed by this Court, and therefore no answer should be required. To the extent an answer is required, Defendant denies the allegations in Paragraph 74.

Defendant denies each and every allegation set forth in the "Wherefore" clause of the Complaint, and further denies that Plaintiff is entitled to any relief against Defendant.

Defendant denies any allegations in the Complaint not specifically admitted, denied, or otherwise fully responded to herein.

AFFIRMATIVE DEFENSES

Defendant makes the following allegations as affirmative defenses without admitting that it bears the burden of persuasion or presentation of evidence on each or any of these matters.

FOR A FIRST AFFIRMATIVE DEFENSE

1. The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

FOR A SECOND AFFIRMATIVE DEFENSE

2. The Complaint is barred, in whole or in part, on the basis of documentary evidence and/or the parol evidence rule.

FOR A THIRD AFFIRMATIVE DEFENSE

3. The Complaint is barred, in whole or in part, by the applicable statutes of limitations.

ADDITIONAL DEFENSES

4. Defendant reserves the right to raise any additional defenses as may be found to be merited during the course of discovery in, or trial of, this action, including without limitation any equitable defense.

WHEREFORE, Defendant respectfully requests that this Court enter judgment in its favor, dismiss the Complaint with prejudice, award Defendant his costs, attorneys' fees and expenses, and grant such other relief as this Court deems proper.

Dated: August 19, 2014
New York, New York

Respectfully submitted,

By: /s/ Michael E. DeLarco

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David J. Baron
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875 Third Avenue
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Telephone: (212) 918-3000
Facsimile: (212) 918-3100
Attorneys for Defendant Jonathan Hoefler

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

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER,

Defendant.

Index No. 650139/2014

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendant Jonathan Hoefler, by his undersigned attorney, hereby appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, from Order the Supreme Court, New York County, Honorable Jeffrey K. Oing, dated July 31, 2014 and entered in the Office of the Clerk of the Court, New York County, on August 4, 2014. The Order is embodied in a transcript that was So Ordered by the Court, a copy of which is annexed hereto and incorporated herein.

August 29, 2014
New York, New York

HOGAN LOVELLS US LLP

By: /s/ Michael E. DeLarco
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Attorneys for Defendant Jonathan Hoefler

To: Fredric Newman
Kerin Lin
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(212) 689-8808
Attorneys for Plaintiff Tobias Frere-Jones

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

TOBIAS FRERE-JONES, Plaintiff, -against- JONATHAN HOEFLER, Defendant.	Index No. 650139/2014 **CIVIL APPEAL PRE-ARGUMENT STATEMENT**

Pursuant to Section 600.17 of the Rules of the Appellate Division, First Department, Defendant-Appellant Jonathan Hoefler ("Hoefler"), by his counsel Hogan Lovells US LLP, states as follows:

1. The title of this action is indicated in the above caption.

2. The full names of the parties are set forth in the above caption. There have been no changes.

3. The names, address, and telephone number of counsel for Hoefler are:

Michael E. DeLarco
David J. Baron
Hogan Lovells US LLP
875 Third Avenue
New York, New York 10022
(212) 918-3000

4. The names, address, and telephone number of counsel for Plaintiff-Respondent, Tobias Frere-Jones ("Frere-Jones") are:

Fredric Newman
Kerin Lin
HOGUET NEWMAN REGAL & KENNEY LLP
10 East 40th Street
New York, New York 10016
(212) 689-8808

5. The court and county from which the appeal is taken is: Commercial Division of the Supreme Court of the State of New York, New York County (Hon. Jeffrey K. Oing, J.S.C.).

6. This action was commenced by Frere-Jones on or about January 16, 2014, by Summons and Complaint.

7. On March 6, 2014, Hoefler moved to dismiss the Complaint pursuant to N.Y. C.P.L.R. §§ 3211(a)(1), (5), and (7) (the "Motion"). The Motion was fully briefed as of April 18, 2014.

8. On July 31, 2014, Justice Oing heard argument on the Motion and decided the Motion in open court and on the record.

9. This appeal is from the Order issued by Justice Oing, dated July 31, 2014, which is embodied in a transcript So Ordered by the Court, and entered in the Office of the Clerk of the County of New York on August 4, 2014.

10. The nature and object of the action is as follows:

Frere-Jones claims that in the summer of 1999, he entered into an oral agreement with Hoefler whereby Hoefler allegedly promised Frere-Jones half of Hoefler's personal shares in the Hoefler Type Foundry, Inc., a New York Corporation Hoefler founded in 1989 ("HTF"), in exchange for specific consideration that Frere-Jones provided to HTF no later than 2004. Frere-Jones further claims the alleged 1999 oral contract was not breached until 2013 (First Cause of Action) and thus was timely filed. Frere-Jones also asserts alternative claims for promissory estoppel (Second Cause of Action), constructive trust (Third Cause of Action), unjust enrichment (Fourth Cause of Action), and fraud (Fifth Cause of Action). Hoefler defends on the grounds, among others, that the Complaint is barred by the applicable statutes of limitations, the parol

evidence rule, and the law governing the relationship between written contracts and quasi-contractual claims.

11. The result reached in the Supreme Court, Commercial Division is as follows:

The Court granted Defendant Hoefler's Motion in part and denied it in part. The Court dismissed the Third (Constructive Trust) and Fifth (Fraud) Causes of Action, but denied the Motion with respect to the First (Contract), Second (Promissory Estoppel), and Fourth (Unjust Enrichment) Causes of Action.

12. The grounds for seeking reversal of that portion of the Order that denied Defendant Hoefler's Motion include, among others:

a. Statutes Of Limitations: The Court held that Frere-Jones' First, Second, and Fourth Causes of Action are not time-barred because the applicable statutes of limitations on Plaintiff's claims were tolled from 2004 to 2013 for two reasons. First, the Court held that certain writings attached to Plaintiff's Affidavit in Opposition to Defendant's Motion to Dismiss tolled the applicable statutes of limitations under the General Obligations Law § 17-101 ("Section 17-101"). The Court's ruling was in error because no writing attached to Plaintiff's Affidavit amounts to a written acknowledgment of the debt he now claims to be owed, which is required to the toll the statutes of limitations on a breach of contract or quasi-contract claim under Section 17-101. Second, the Court held that Plaintiff's claims First, Second, and Fourth Causes of Action were tolled by the doctrine of equitable estoppel. This, too, was error because equitable estoppel cannot be used to avoid a failure under Section 17-101 and because, in any event, the alleged oral assurances that Hoefler would perform on the purported contract sometime in the future are insufficient as a matter of law to warrant invoking the doctrine of equitable estoppel.

b. Parol Evidence Rule: On March 9, 2004—five years after his alleged 1999 oral contract—Frere-Jones simultaneously entered into two written agreements (the "Written Agreements"). The Written Agreements specifically account for the consideration that Frere-Jones claims he agreed to provide to Hoefler in exchange for half of Hoefler's shares in HTF when they entered into the alleged oral agreement in 1999. However, the Written Agreements, read in tandem, provide Frere-Jones with employment and other consideration—not shares in HTF—in exchange. The Court held that the parol evidence rule does not bar Frere-Jones' claim for half of Hoefler's shares in HTF because one of the Written Agreements does not contain a merger clause. The Court erred because the lack of a merger clause is an insufficient basis to allow parol evidence that an otherwise fully integrated written agreement failed to include something as significant as the consideration Frere-Jones now claims he is owed.

c. Preclusion Of Quasi-Contract Claims Based On Written Agreements: It is settled law that the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract for events arising out of the same subject matter. Here, Frere-Jones' quasi-contract Causes of Action for promissory estoppel (Second Cause of Action) and unjust enrichment (Fourth Cause of Action) arise from the same subject matter as the Written Agreements and should have been dismissed based thereon. The Court denied the Motion with respect to these claims without specifically addressing these arguments. This was in error.

Hoefler reserves his right to appeal any other issues properly presented by the Order on appeal.

13. There are no related actions, proceedings, or appeals pending in this or any other jurisdiction known to Hoefler.

August 29, 2014
New York, New York

Respectfully submitted,

By: /s/ Michael E. DeLarco

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David J. Baron
Hogan Lovells US LLP
875 Third Avenue
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To: Fredric Newman
Kerin Lin
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(212) 689-8808
Attorneys for Plaintiff Tobias Frere-Jones

Robin Dorantes

From: Simone A. Abrams
Sent: Wednesday, September 24, 2014 4:35 PM
To: Jeffrey K. Oing; Tracey Dunn; Samuel Yaggy
Cc: Robin Dorantes
Subject: Tobias Frere-Jones vs. Jonathan Hoefler

SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION
ALTERNATIVE DISPUTE RESOLUTION PROGRAM

REPORT FORM

Wednesday, September 24, 2014

Index No. : 650139/2014

Tobias Frere-Jones

-vs-

Jonathan Hoefler

This case was referred to me for alternative dispute resolution by order of Justice Oing, dated 7/22/2014. In an effort to resolve or narrow the dispute, a session was held. The results were as follows *(Please check one)*:

__x____ The matter has been settled.

_____ The matter has been settled before mediation.

_____ The matter has been dismissed.

_____ The matter has been withdrawn.

_____ The matter remains unresolved and is ready to proceed in court.

_____ The matter has been resolved in part and is ready to proceed in court.

_____ The matter remains unresolved and is ready to proceed in court for

failure to comply with ADR rules and/or neutral's instructions by one or all parties.

Please do not hesitate to call the Commercial Division ADR Program if you have any questions.

Simone Abrams
ADR Coordinator

EXECUTION VERSION

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

TOBIAS FRERE-JONES, Plaintiff, -against- JONATHAN HOEFLER, Defendant.	Index No. 650139/2014 **STIPULATION OF DISMISSAL WITH PREJUDICE**

IT IS HEREBY STIPULATED AND AGREED by and between Plaintiff Tobias Frere-Jones and Defendant Jonathan Hoefler that the above-captioned action be dismissed in its entirety with prejudice and without costs or attorneys' fees to any party against the other, and that an order to that effect be entered with notice.

Dated: New York, New York
October 30, 2014

HOGUET NEWMAN REGAL & KENNEY LLP

By: _____
Fredric Newman
Kerin Lin
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(212) 689-8808
Attorneys for Plaintiff Tobias Frere-Jones

HOGAN LOVELLS US LLP

By: _____
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Attorneys for Defendant Jonathan Hoefler

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

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER,

Defendant.

Index No. 650139/2014

NOTICE OF WITHDRAWAL OF APPEAL

PLEASE TAKE NOTICE that Defendant Jonathan Hoefler, by his undersigned attorney, hereby withdraws its appeal, filed on August 29, 2014 to the Appellate Division of the Supreme Court of the State of New York, First Department, from Order of the Supreme Court, New York County, Honorable Jeffrey K. Oing, dated July 31, 2014 and entered in the Office of the Clerk of the Court, New York County, on August 4, 2014.

November 6, 2014
New York, New York

HOGAN LOVELLS US LLP

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Attorneys for Plaintiff Tobias Frere-Jones

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

TOBIAS FRERE-JONES,

Plaintiff,

-against-

JONATHAN HOEFLER

Defendant.

Index No. 650139/2014

NOTICE OF WITHDRAWAL OF CROSS-APPEAL

PLEASE TAKE NOTICE that Plaintiff Tobias Frere-Jones, by his undersigned attorneys, hereby withdraws his cross appeal, filed on September 8, 2014 to the Appellate Division of the Supreme Court of the State of New York, First Department, from that portion of the Order of the Supreme Court, New York County, Honorable Jeffrey K. Oing, entered in the above-entitled action in the Office of the Clerk of the Court, New York County, on July 31, 2014 and served with notice of entry on August 4, 2014, which dismissed Plaintiff's Fifth Cause of Action alleging fraud.

November 11, 2014
New York, New York

HOGUET NEWMAN
REGAL & KENNEY LLP

By: _____

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Short Caption: **Tobias Frere-Jones - v. - Jonathan Hoefler**
Case Type: **Commercial Division**
Case Status: **Disposed**
eFiling Status: **Full Participation Recorded**
Assigned Judge: **Jeffrey Oing**

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Motion Info: Please select...

Filed Date: thru

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#	Document	Filed By	Status
1	SUMMONS	Lin, K. Filed: 01/16/2014 *Received: 01/16/2014*	**Processed** Confirmation Notice
2	COMPLAINT	Lin, K. Filed: 01/16/2014 *Received: 01/16/2014*	**Processed** Confirmation Notice
3	AFFIDAVIT *Affidavit of Service*	Lin, K. Filed: 01/16/2014 *Received: 01/16/2014*	**Processed** Confirmation Notice
4	STIPULATION - OTHER *Stipulation extending Defendant's time to respond to the Complaint in this action to 2/21/2014*	Delarco, M. Filed: 02/03/2014 *Received: 02/03/2014*	**Processed** Confirmation Notice
5	STIPULATION - OTHER *Stipulation extending the time for Defendant to respond to the Complaint to 3/7/14*	Baron, D. Filed: 02/20/2014 *Received: 02/20/2014*	**Processed** Confirmation Notice
6	STIPULATION - OTHER *Stipulation setting briefing schedule regarding the Motion to Dismiss*	Delarco, M. Filed: 03/06/2014 *Received: 03/06/2014*	**Processed** Confirmation Notice
7	NOTICE OF MOTION (Motion #001)	Delarco, M. Filed: 03/06/2014 *Received: 03/06/2014*	**Processed** Confirmation Notice
8	MEMORANDUM OF LAW IN SUPPORT (Motion #001)	Delarco, M. Filed: 03/06/2014 *Received: 03/06/2014*	**Processed** Confirmation Notice
9	AFFIDAVIT OR AFFIRMATION IN SUPPORT (Motion #001) *Affirmation of Michael E. DeLarco in Support of the Motion to Dismiss*	Delarco, M. Filed: 03/06/2014 *Received: 03/06/2014*	**Processed** Confirmation Notice
10	EXHIBIT(S) - A (Motion #001) *Exhibit A to the Affirmation of Michael E. DeLarco*	Delarco, M. Filed: 03/06/2014 *Received: 03/06/2014*	**Processed** Confirmation Notice
11	EXHIBIT(S) - B (Motion #001) *Exhibit B to the Affirmation of Michael E. DeLarco*	Delarco, M. Filed: 03/06/2014 *Received: 03/06/2014*	**Processed** Confirmation Notice
12	EXHIBIT(S) - C (Motion #001) *Exhibit C to the Affirmation of Michael E. DeLarco*	Delarco, M. Filed: 03/06/2014 *Received: 03/06/2014*	**Processed** Confirmation Notice
13	RJI -RE: NOTICE OF MOTION (Motion #001)	Delarco, M. Filed: 03/06/2014 *Received: 03/06/2014*	**Processed** Confirmation Notice
14	ADDENDUM - COMMERCIAL DIVISION (840C) (Motion #001)	Delarco, M. Filed: 03/14/2014 *Received: 03/14/2014*	**Processed** Confirmation Notice
15	MEMORANDUM OF LAW IN OPPOSITION (Motion #001)	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
16	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION (Motion #001) *Affidavit of Plaintiff Tobias Frere-Jones in Opposition to Defendant's Motion to Dismiss*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
17	EXHIBIT(S) - A (Motion #001) *Exhibit A to the Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
18	EXHIBIT(S) - B (Motion #001) *Exhibit B to the Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
19	EXHIBIT(S) - C (Motion #001) *Exhibit C to the Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
20	EXHIBIT(S) - D (Motion #001) *Exhibit D to Tobias Frere-Jones's Affidavit*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
21	EXHIBIT(S) - E (Motion #001) *Exhibit E to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014	**Processed** Confirmation Notice

	Exhibit E to Affidavit of Tobias Frere-Jones	Filed: 04/04/2014 *Received: 04/04/2014*	Confirmation Notice
22	EXHIBIT(S) - F (Motion #001) *Exhibit F to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
23	EXHIBIT(S) - G (Motion #001) *Exhibit G to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
24	EXHIBIT(S) - H (Motion #001) *Exhibit H to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
25	EXHIBIT(S) - I (Motion #001) *Exhibit I to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
26	EXHIBIT(S) - J (Motion #001) *Exhibit J to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
27	EXHIBIT(S) - K (Motion #001) *Exhibit K to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
28	EXHIBIT(S) - L (Motion #001) *Exhibit L to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
29	EXHIBIT(S) - M (Motion #001) *Corrected* *Exhibit M to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/07/2014*	**Processed** Confirmation Notice
30	EXHIBIT(S) - N (Motion #001) *Exhibit N to Affidavit of Tobias Frere-Jones*	Lin, K. Filed: 04/04/2014 *Received: 04/04/2014*	**Processed** Confirmation Notice
31	MEMORANDUM OF LAW IN REPLY (Motion #001) *Reply Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint*	Delarco, M. Filed: 04/18/2014 *Received: 04/18/2014*	**Processed** Confirmation Notice
32	LETTER / CORRESPONDENCE TO JUDGE *Letter from Fredric Newman to Judge Oing re Discovery Conference*	Newman, F. Filed: 07/07/2014 *Received: 07/07/2014*	**Processed** Confirmation Notice
33	LETTER / CORRESPONDENCE TO JUDGE	Delarco, M. Filed: 07/08/2014 *Received: 07/08/2014*	**Processed** Confirmation Notice
34	ORDER - REFERENCE *ORDER OF REFERENCE entered in the office of the County Clerk on July 22, 2014*	Court User Filed: 07/22/2014 *Received: 07/22/2014*	**Processed** Confirmation Notice
35	DECISION + ORDER ON MOTION (Motion #001) *re: motion no. 001, DECISION + ORDER ON MOTION entered in the office of the County Clerk on July 24, ... show more*	Court User Filed: 07/24/2014 *Received: 07/24/2014*	**Processed** Confirmation Notice
36	TRANSCRIPT OF PROCEEDINGS *Transcript to be So-Ordered*	Baron, D. Filed: 07/31/2014 *Received: 07/31/2014*	**Processed** Confirmation Notice
37	TRANSCRIPT - SO ORDERED *SO ORDERED TRANSCRIPT entered in the office of the County Clerk on July 31, 2014*	Court User Filed: 07/31/2014 *Received: 08/04/2014*	**Processed** Confirmation Notice
38	NOTICE OF ENTRY (Motion #001)	Lin, K. Filed: 08/04/2014 *Received: 08/04/2014*	**Processed** Confirmation Notice
39	ANSWER	Delarco, M. Filed: 08/19/2014	**Processed** Confirmation Notice