

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

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

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INDEX NO. 653855/2015

TATIANA BRUNETTI, individually, and as a member suing derivatively on behalf of GINZA HOLDING LLC and GINZA PROJECT LLC, individually, and as a member suing derivatively on behalf of GINZA 2 LLC,

MOTION SEQ. NO. 012 013 014

Plaintiffs,

- v -

DMITRY SERGEEV, GINZA 2, LLC, GINZA HOLDING, LLC, GINZA MANAGEMENT, LLC, ALEXANDER DZERNEYKO, ALEXANDER KVARTSKHELIYA, SAIA RESTAURANT GROUP LLC, GINZA 1 LLC, GINZA 3 LLC, ILYA BYKOV, GANS MEX LLC, SOUTHWEST VALLEY LLC, TRISKONEX HOLDINGS LIMITED,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 335, 336, 337, 340, 341, 342, 377 and number (Motion 013) 338, 339, 343, 344, 345, 378

were read on these motions to RELIEVE COUNSEL.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431

were read on this motion for CONTEMPT.

Upon the foregoing documents, it is ORDERED that plaintiffs' motion for leave to amend is GRANTED without opposition, plaintiffs' motion to hold defendants in contempt and for additional related relief is DENIED, and to the extent set forth the motions by defendants' counsel to withdraw are GRANTED.

On consent of defendants and without prejudice to their right to move to dismiss (*see* Dkt. 417 at 21 n 9), plaintiffs may file their proposed fourth amended complaint (Dkt. 351) by November 17, 2020. Defendants' deadline to respond is December 21, 2020 (four weeks after defendants' deadline to retain replacement counsel).

There is no basis to hold defendants in contempt. Even if the renovations arguably were not within the ordinary course of business, that is not obvious so it cannot be said that doing

so violated a clear and unequivocal mandate (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; see *Storman v New York City Dep't of Educ.*, 95 AD3d 776, 777 [1st Dept 2012], citing *Hae Mook Chung v Maxam Props., LLC*, 52 AD3d 423 [1st Dept 2008]). If plaintiffs wanted, as is often the case in litigation over management of a closely held company, for there to be limits on the amount of expenditures, they could have made such a request -- and more importantly the court set no such limit. In any event, plaintiffs benefit from renovations that help the business and the decision to renovate is a matter of business judgment that the court will not second-guess. To the extent plaintiffs claim there was self dealing involved in the renovations, they have not submitted conclusive proof. Regardless, if they can prove waste or interested transactions then they may be able to seek recovery for breach of fiduciary duty; but not, on this record, for contempt.

Plaintiffs also have not proven that additional payments were made to defendants' counsel in violation of the court's orders, nor is there a basis on a contempt motion (rather than on a plenary claim) to seek disgorgement of fees that constitute corporate waste that were not actually prohibited by the court before they were made. The court will not revisit its prior rulings based on the prior accusations of contempt (see Dkt. 317).

There also is no basis on this motion to grant plaintiffs advancement of their legal fees. In contravention of the court's prior ruling, this request is unsupported by authority demonstrating why advancement is permitted (see Dkt. 327). An advancement claim must be based on governing operating agreements (see *Ficus Investments, Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 7 [1st Dept 2009]). General claims of fairness will not suffice. Plaintiffs improperly conflate their potential right to indemnification in the event they procure a judgment constituting a corporate benefit with the right to advancement (*Crossroads ABL LLC v Canaras Capital Mgt., LLC*, 105 AD3d 645 [1st Dept 2013] ["Indemnification and advancement of legal fees are two distinct corporate obligations"]; see *Mangovski v DiMarco*, 175 AD3d 947, 949 [4th Dept 2019]).

There is no basis for summarily awarding the remainder of the relief that plaintiffs seek. They are overreaching out of frustration with the failed settlement, which they blame on defendants. In the end, if plaintiffs recover, nine-percent interest will be awarded and attorneys' fees may ultimately be indemnified for certain claims. The court cannot take a massive shortcut to the end by granting plaintiffs part of the ultimate relief that they seek in this action without a trial and alter the status quo regardless of how plaintiffs denominate the relief that they are seeking (see *Spectrum Stamford, LLC v 400 Atl. Title, LLC*, 162 AD3d 615, 617 [1st Dept 2018]). To be sure, the allegations of wrongdoing are serious (see Dkt. 208), and more has supposedly subsequently been uncovered. Without more clarity, analytical precision and, most importantly, legal support for relief requested, nothing can be done.

The parties must abide by the schedule set in the order to show cause (which is reiterated below) regarding ESI so this case may proceed expeditiously (*see* Dkt. 376 at 7).

Accordingly, it is ORDERED that the motions by Russo PLLC (Russo) and M. Ross & Associates, LLC (Ross) to withdraw as counsel for Ginza Management LLC, Ginza 1 LLC, Ginza 2 LLC, Ginza 3 LLC (collectively, the Ginza Parties) and Dmitry Sergeev (collectively, the Sergeev Parties) are GRANTED on condition that, within two days of the e-filing of this order, Russo and Ross e-file proof of compliance with the following requirements: Russo and Ross must promptly serve their former clients by emailing Sergeev a copy of this order, notice of entry, and a letter directing them to immediately retain replacement counsel and comply with the directives set forth below, and which shall explain the ramifications of noncompliance; and it is further

ORDERED that this action is stayed until November 23, 2020 at 9:30 a.m., by which time replacement counsel for defendants must e-file a notice of appearance that includes their email addresses; and it is further

ORDERED that by November 30, 2020, the parties shall e-file and email the court a proposed schedule to produce their ESI requiring such review to begin no later than December 1, 2020; and it is further


ORDERED that a telephone conference will be held on December 2, 2020 at 3:00 p.m., for which plaintiffs' counsel shall circulate by email a dial-in number 30 minutes beforehand; and it is further

ORDERED that if a new attorney for the Ginza Parties (LLCs that cannot appear pro se) does not e-file a notice of appearance by November 23 and participate in the December 2 call, the Ginza Parties will be held in default, their answer will be stricken, their claims will be dismissed, and plaintiffs may move for a default judgment against them; and it is further

ORDERED that if a new attorney for Sergeev does not e-file a notice of appearance by November 23 and participate in the December 2 call, or alternatively if Sergeev does not personally participate in the December 2 call, Sergeev will be held in default, his answer will be stricken, and plaintiffs may move for a default judgment against him.

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11/13/2020
DATE


JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER