SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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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,

Plaintiffs,

-against-

DMITRY SERGEEV, a/k/a DZHEMALI KVARATSKHELIYA, 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,

Defendants.

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GINZA 2 LLC and GINZA MANAGEMENT LLC,

Third-Party Plaintiffs,

-against-

GINZA PROJECT LLC,

Third-Party Defendant.

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Index No.: 653855/2015

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 005, 006, 007, 008, and 009 are consolidated for disposition.

Before the court are five motions to dismiss the second amended complaint (the SAC) filed by defendants: (1) Ginza 1 LLC (Ginza 1), Ginza 2 LLC (Ginza 2), Ginza 3 LLC (Ginza 3), Ginza Management LLC (Management), Dmitry Sergeev, and Alexander Dzerneyko (collectively, the Sergeev Movants) [Seq. 005]; (2) Ginza Holding LLC (Holding) [Seq. 006]; (3) Southwest Valley LLC (Southwest) [Seq. 007]; (4) Protax Services Corp a/k/a Protax Services,

Inc. (Protax) and Ilya Bykov [Seq. 008]; and (5) Gans-Mex LLC (Gans-Mex) [Seq. 009]. Plaintiffs Tatiana Brunetti and Ginza Project LLC (Project) oppose these motions and cross-move for (1) summary judgment on their accounting claims; and (2) for sanctions against Sergeev for failure to comply with the court's disclosure order made during oral argument on the motions to dismiss the first amended complaint (the FAC). The Sergeev Movants oppose the cross-motion. For the reasons that follow, the motions and cross-motion are granted in part and denied in part.

I. Background

The facts recited are taken from the SAC (Dkt. 80)[1] and the documentary evidence submitted by the parties.

Sergeev, a Russian national, provides management services for restaurants in Russia. In 2007, Sergeev solicited Brunetti, who lives in the United States, to manage "Mari Vanna" brand restaurants across the United States, allegedly as a principal. Restaurants, eventually, were opened in New York, California, Florida, and the District of Columbia. Generally, Brunetti alleges that Sergeev failed to (1) pay her the amounts that she was promised as compensation and repay debts she paid or guaranteed on behalf of the restaurants; and (2) cause his other businesses (e.g., a night club) to repay loans made to them from one of the restaurants. The first allegation forms the basis of claims asserted directly by Brunetti, while the latter is the subject of derivative claims she asserts on behalf of the LLC that owns the restaurant in which she is a member (except for one loan made personally by her and which is the subject of a direct claim). Brunetti has been cut out of the restaurants, leaving her in the dark about their current state of

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

affairs. She has requested the restaurants' books and records and an accounting – the former of which has already been ordered to be produced[2] while the latter is ordered herein.

Brunetti originally commenced this action on November 23, 2015. While her original complaint (Dkt. 1) and the FAC (Dkt. 28) indicated the existence of meritorious claims, they were insufficient due to their imprecise factual allegations and erroneous legal theories. By order dated August 18, 2016 (Dkt. 74), the court granted defendants' motion to dismiss the FAC without prejudice and permitted Brunetti to file a second amended complaint. *See* Dkt. 78 (8/16/16 Tr.). In addition, given the reference to and clear import of Ginza 2's (Mari Vanna NYC) operating agreement[3] – which Brunetti did not have and to which she is a party – the court directed Sergeev to produce it. *See id.* at 16 ("It also seems to me that the Operating Agreements for Ginza 2 are necessary before the … complaint can even be amended, and I am directing that Mr. Sergeev turn [over] that … Operating Agreement to the Plaintiff and if he does not have it, I want him to submit an affidavit explaining who created that Operating Agreement, which lawyer, that he looked for it, what he did to look for it, whether he contacted the law office who created it … and what their response was."). He did not. On September 19, 2016, Sergeev filed an affidavit in which he claimed that "[t]he only executed Ginza 2 document I was able to locate was the Third Amendment To Operating Agreement of Ginza 2, LLC, dated as of December 31, 2012," which was submitted as an exhibit to the prior motions. *See* Dkt. 75 at 2. Sergeev, in his affidavit, does not purport to have contacted the lawyer who drafted the operating agreement (Daniel Kolko, who, at the time, was employed by Phillips Nizer LLP). That said, he has now

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[2] *See* Dkt. 188 at 4 (books and records to be produced by September 19, 2017).

[3] Sergeev submitted only a third amendment to the operating agreement to the court. The amendment referenced and reaffirmed the operating agreement, an important document in this litigation involving an LLC.

done so,[4] and Kolko claims not to have the operating agreement (which, of course, may still be sought in discovery).

Without the benefit of Ginza 2's original operating agreement, plaintiffs filed the SAC on November 18, 2016. *See* Dkt. 80. It contains 42 causes of action, which are itemized further herein. Between February 3, 2017 and May 8, 2017, defendants moved to dismiss the SAC.[5] The court reserved on the motions after oral argument. *See* Dkt. 186 (7/13/17 Tr.).

While there are still issues with many of the claims, the SAC contains detailed, highly troubling allegations. As discussed herein, the core breach of contract claims are well pleaded and survive dismissal. Moreover, Brunetti has clearly established her right to an accounting under New York law, and, thus, she is granted partial summary judgment on that claim. That said, the remainder of her claims warrant dismissal, either because they are time barred, duplicative, or improperly pleaded (though with the benefit of financial discovery and an accounting, many claims may be capable of being properly repleaded).

II. Allegations in the SAC

In 2007, "Sergeev began to explore options to introduce the Mari Vanna brand to the United States, based on its success in Russia," and solicited Brunetti to become his "'eyes' and 'ears', as well as the 'face' of the Mari Vanna brand in the United States." SAC ¶¶ 31, 33. "Sergeev's intention was to use Brunetti for her expertise and experience and her connections in New York City, to promote and market the Mari Vanna brand of restaurants in New York City." ¶ 34. The New York restaurant, called Mari Vanna NYC, was to be owned by Ginza 2, a New

[4] The sanctions motion is being denied because any civil contempt finding would have been permitted to be purged on condition that Sergeev contact Kolko, and the issue may better be one dealt with as a spoliation concern.

[5] The staggered filing dates are of no dispositive consequence and are not addressed.

York LLC. "At a meeting between Sergeev and Brunetti on or around March 2007, the two [allegedly] entered into [the following] verbal agreement": (1) "Sergeev agreed to organize the capital and any monetary investment, Brunetti agreed to promote, open and operate the Mari Vanna brand of restaurants in the United States"; (2) "Brunetti's tasks … were to include supervising the construction works, marketing, promotional campaigns, hiring of employees, training, and development of the menu for the Mari Vanna restaurants in the United States"; (3) "In exchange for her labor and efforts, … Brunetti would be named a Founding Partner and Chief Executive Officer in the United States for all of the Mari Vanna restaurants to open in the United States"; (4) "in exchange for Brunetti's promotion of and management of Ginza 2, … **Brunetti would receive a 25% ownership interest in Ginza 2 and all other Mari Vanna restaurants**, and would become the 'working partner'"; (5) Brunetti would receive [25%] of the profits of each of the Mari Vanna restaurants; and (6) "Brunetti would have other company benefits **such as health insurance** and travel expenses." ¶¶ 35-37 (emphasis added). The parties further agreed that each restaurant was to be owned by a separate LLC, and that each LLC's operating agreement would "indicate[]that Brunetti owns 25% of each entity." ¶ 38. In addition to these equity grants and perks, Brunetti was to receive "monthly dividend checks totaling $10,000 per month or $120,000 per year, **said compensation to be paid personally by Sergeev**." ¶ 39 (emphasis added). This compensation, allegedly, was never paid, nor was Brunetti provided the promised "health insurance, travel expenses, and her other business expenses." ¶¶ 40-46.

Brunetti claims that the operating agreement for Ginza 2 was executed on March 13,

2008. ¶ 47. Brunetti, as noted, does not have possession of that operating agreement.[6] It, allegedly, "names Sergeev as the manager for Ginza 2," "and he remains the manager of Ginza 2 till the present date." ¶ 48. Critically, Brunetti's wholly owned New York LLC, Project (i.e., not Brunetti individually), owns a 25% membership interest in Ginza 2. The remainder of Ginza 2's membership interests are owned by Management, an LLC controlled by Sergeev, which owns 74%, and Sergeev's son, non-party Alexander Kvartskheliya, who owns 1%. By contrast, Brunetti's interest in the California restaurant – which is owned by defendant Saia Restaurant Group LLC (Saia),[7] a California LLC – is held through Brunetti's 50% membership interest in Holding (the other 50% of Holding is owned by Sergeev).[8] Holding owns a 20% membership interest in Saia, and is its manager.[9] Holding also owns a 50% membership interest in Ginza 3, another New York LLC.[10]

Mari Vanna NYC opened in July 2009 and, allegedly, was profitable by December 2009. ¶¶ 51, 69. This success, ostensibly, was due to Brunetti extensive efforts, which included "spending at least 10 hours each work day on interviewing contractors, subcontractors, future

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[6] Where, at this juncture, "there is no operating agreement or the operating agreement fails to address issues in dispute, the default provisions under the [New York] Limited Liability Company Law govern." *Shapiro v Ettenson*, 146 AD3d 650 (1st Dept 2017). If operating agreements are located in discovery and they are determined to be genuine and binding, their terms, of course, will govern. *See In re 1545 Ocean Ave., LLC*, 72 AD3d 121, 128-29 (2d Dept 2010).

[7] Saia has not responded to the SAC, apparently, because it has not been served.

[8] Although Brunetti herself is not a member of Saia, she alleges the existence of an agreement that personally entitles her to a management fee of 8% of its net sales. *See* SAC ¶ 78.

[9] For the purposes of this decision, a complete discussion of all of the restaurants, such as another California restaurant named Church Key, is not necessary.

[10] The SAC does not explain what Ginza 3 does, nor did its counsel know the answer to that question when asked at the August 10, 2017 preliminary conference.

workers of the restaurant, PR companies, food and beverages suppliers, marketing consultants, and in meetings with local chefs and owners." ¶ 50. "Following Mari Vanna NYC's success, Sergeev and [Brunetti] established Mari Vanna in Washington, DC in December 2011 and another Mari Vanna restaurant in Los Angeles in June 2012." ¶ 72.

Prior to its opening, between July 2008 and July 2009, investors contributed more than $2 million to Ginza 2. Allegedly, Sergeev transferred "approximately 25% of this money" to his other businesses, Ginza 1[11] (which owns the Double Seven Club) and Gans-Mex[12] (which owns Los Dados Mexican Restaurant). Ginza 2's loss of this investment money allegedly caused it to "struggle[] with a shortage of funds during the build out of the restaurant." ¶ 55.

Ginza 2's financial struggles became a problem for Brunetti. She had personally guaranteed its lease, as well as the leases of the other restaurants. Additionally, "Sergeev ... used Brunetti's personal credit and reputation to open accounts with suppliers of food and liquor and to obtain a liquor license and required that Brunetti personally guarantee some of those accounts." ¶ 57. "Sergeev claimed that this was necessary as he only had a temporary green card and Brunetti was and is an American citizen." *Id.* Also, Brunetti personally guaranteed many of the restaurants' contracts with their suppliers. Further, the restaurants' liquor licenses were procured by Brunetti and are in her name.

"Throughout 2008 to 2012, Sergeev[] directed Brunetti to loan money from Ginza 2 to Ginza 1 and Gans Mex LLC." ¶ 63. $500,000 was loaned to Ginza 1, and $1.4 million was loaned to Gans-Mex. Sergeev represented that these "entities were adequately capitalized," and he promised that the loans would be repaid with interest (the rate is not alleged). *Id.* The loans

[11] Management, Sergeev's LLC, owns Ginza 1. Ginza 1 apparently no longer operates as a going concern, and it is unclear whether plaintiffs have any interest in it.

[12] Sergeev allegedly owns 80% of Gans-Mex.

have never been repaid, despite Brunetti's demands. "In 2012, Brunetti loaned $51,000 from her personal funds to cover the rent of Ginza 1 for the month of April, based upon an agreement with Ginza 1 and Sergeev that the loan would be repaid to her by Ginza 1 and Sergeev. This loan was never repaid." ¶ 68. According to Brunetti, she is owed nearly $2 million, exclusive of interest.

In September 2012, allegedly, "without Ms. Brunetti's consent, and without any agreement or discussion, Sergeev unilaterally appointed Dzerneyko as Chief Financial Officer of Ginza 2 and all Ginza Entities in the United States."[13] ¶ 71. "Beginning in early 2014 and lasting through August 2014, Dzerneyko began to pressure Brunetti into reducing her membership interest in Ginza 2 from [25%] to [9%]." ¶ 75. "Dzerneyko insisted that Brunetti sign a fourth amendment to Ginza 2 operating agreement diluting her membership interest. Brunetti refused." *Id.* Allegedly, "Dzerneyko, acting upon the instructions of Sergeev, pressured Brunetti to dilute her shares in an effort to oust her from both Ginza 2 and Ginza Holding." ¶ 76. "Also, in March 2014, Dzerneyko emailed Sergeev's counsel without Brunetti's consent and instructed him to transfer 50 percent of ownership in Ginza 2 from [Holding][14] to [Management] and 6% to" defendant Triskonex Holdings Limited (Triskonex). ¶ 79. Triskonex is incorporated in Cyprus. It does not appear to have been served, nor has it appeared in this action.[15]

"In the middle of 2013, [Brunetti] received a letter from the Internal Revenue Service ("IRS") notifying her that [Ginza 3] owed $200,000 in payroll taxes and sales taxes. The amount

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[13] Dzerneyko's denial of this allegation is of no moment because the claims against him are dismissed, regardless of the exact nature of his role or formal title.

[14] The court does not understand this allegation, since Holding does not have a membership interest in Ginza 2; Project does. In any event, any purported transfers of Project's interest in Ginza would most certainly be a nullity absent Brunetti's consent. The court assumes Project is still a member – a proposition defendants have not contested.

[15] The SAC contains no meaningful explanation of this entity or who controls it. In any event, no actual meritorious claims appear to be pleaded against it.

currently claimed to be owed to the IRS is over $300,000." ¶ 82. "Sergeev represented to [Brunetti] that Sergeev's accountant, Ilya Bykov, would resolve the tax matter regarding Ginza 3 with the IRS. [Bykov] was responsible for all accounting matters at Ginza 2 and [Holding]." ¶ 83. "From October 2013 until October 2015, Brunetti repeatedly requested that [Bykov] resolve Ginza 3's taxation issues, and provide Brunetti with all profit and loss reports, auditing reports and tax returns for Ginza 2 and [Holding]. [Bykov] refused." ¶ 84. "On or around October 25, 2013, Dzerneyko prepared documents purportedly on behalf of [Holding], which stated that [Holding] would resign as manager of Saia, and assign its 20 percent membership interest in Saia to [Southwest], which is owned by Dezerneyko[] and Sergeev. Brunetti refused to sign this resignation." ¶ 85. Defendants admit that Holding still owns its 20% membership interest in Saia. *See* Dkt. 90 at 15.

"In apparent retaliation for Brunetti's refusal to transfer or otherwise dilute her membership interests, on November 1, 2013, without Brunetti's consent, Sergeev and Dzerneyko changed Mari Vanna NYC's business checking account from Citibank to Bank of America, thereby denying Brunetti access to those operating accounts." SAC ¶ 86.[16] Then, "on November 8, 2013, Sergeev ceased paying Brunetti her monthly dividend, which consisted of the profits of Ginza 2. His stated reason for doing so was due to Brunetti's refusal to allow Ginza Holding's resignation from Saia." ¶ 87. "In August of 2014, [Bykov] asked Brunetti to meet with Sergeev and Dzerneyko in order to resolve Ginza 3's taxation issues. When Brunetti refused **[Bykov] threatened her, stating that you wouldn't want to 'walk on earth, twisting your neck to see who was behind you.'**" ¶ 88 (emphasis added). "Sergeev demanded that Sasha Baluka, Brunetti's accountant, provide him with the K-1 forms for Mari Vanna LA and Mari Vanna DC,

[16] The same was done with Saia's accounts in October 2014.

and demanded information about Brunetti's profits from Mari Vanna DC and Mari Vanna Los Angeles. When [Brunetti] declined to provide this information, **[Bykov] verbally threatened the life of Mr. Baluka and stated that: 'You wouldn't want to mess around with us.'**" ¶ 89 (emphasis added).[17] [Bykov] then proceeded to harass [Baluka] ... by repeatedly calling his office and demanding he provide these documents." ¶ 90.

Also in August 2014, "Sergeev had conveyed to one of Brunetti's co-workers that if Brunetti did not resolve matters peacefully, **Sergeev would commence legal action and 'take everything Brunetti owned.'"** ¶ 91 (emphasis added). "On or about August 25, 2014, Sergeev's counsel sent a letter to Brunetti stating that she was terminated from all positions with Ginza 2, and that she should cease any activities on behalf of the Mari Vanna restaurants as well as cease all communications with all its employees." ¶ 94. Brunetti was then "locked out by Sergeev and Dezerneyko." ¶ 95. "Sergeev and Ginza 2 ceased sending to Brunetti the Mari Vanna NYC's weekly sales reports", and "Sergeev's accountant ceased cooperating with the IRS, despite Brunetti's requests that the taxation issues be resolved to avoid the suspension of her driver's license." ¶¶ 96-97. Brunetti's health insurance was allowed to lapse in August 2014, and she incurred medical bills in excess of $10,000 after an emergency room visit on October 2, 2014. ¶ 98.

"In October 2014, Sergeev offered to resolve all Ginza 3 tax matters in exchange for [Brunetti] re-assigning to him 25% shares of [Ginza 2] and shares of [Saia]. Brunetti refused." ¶ 92. "Sergeev and Dzerneyko then escalated their attempts to oust Brunetti completely from Ginza 2." ¶ 93. They "repeatedly asked Brunetti to sign a corporate resolution diminishing

[17] The court takes this opportunity to note that if any allegations of further threats are made in this action by a party or its agent and such threats are proved, the court will not hesitate to order the offending party to show cause as to why they should not be held in civil and criminal contempt, and will refer the matter to the police.

Brunetti's ownership in Ginza 2 to 9%. Brunetti refused to sign any such document." *Id.* "On October 14, 2014, Sergeev informed one of Brunetti's co-workers, Sasha Poline, that until Brunetti signed the documents to dilute her shares in Ginza 2, Sergeev would not resolve Ginza 3's taxation problems." ¶ 99. "On December 19, 2014, Sergeev's counsel sent Brunetti a letter falsely accusing her of committing various acts of willful misconduct, gross negligence and theft. That letter falsely said that the Ginza companies had lost at least $2,081,036.27, by reason of her acts of willful misconduct, gross negligence and theft." ¶ 102.[18] "On December 24, 2014, Sergeev's accountant emailed [Brunetti] the tax returns for 2012 for [Project and Holding]. [Brunetti] had previously requested the [Ginza 2, Project, Holding, and Ginza 3] tax returns for 2012 and 2013, as well as the filed IRS 1065 Forms. Sergeev's accountant withheld the remainder of the documents requested." ¶ 103. Brunetti still does not have these documents. "Despite requests by Brunetti, Sergeev and Dzerneyko refused to change Ginza 2's mailing address from 41 East 20th Street [in Manhatten]. **Defendants have further opened and improperly disposed of Brunetti's personal mail, including sending [Brunetti's] personal mail, and government and banking correspondence.** ¶ 115 (emphasis added).

"On February 24, 2015, counsel for TransFirst, a merchant credit card processing company, emailed Brunetti, alleging that Saia owed it money, and that Brunetti was liable as the personal guarantor." ¶ 105. "On March 14, 2015, Brunetti was stopped by New Jersey police officers on a New Jersey highway and was informed that her driving license had been suspended due to non-payment of taxes in the State of New York. As a result, [Brunetti] gained points on

[18] On February 9, 2016, Ginza 2 and Management filed a third-party complaint (the TPC) against Project in which Brunetti is accused of malfeasance. *See* Dkt. 25. Similar allegations are made in counterclaims asserted against Brunetti in the answer to her original complaint. *See* Dkt. 8. Despite these pleadings being almost entirely conclusory and legally deficient, plaintiffs did not file a motion to dismiss, and, instead, filed an answer on June 9, 2016. *See* Dkt. 71.

her insurance and could not drive her car, forcing her to call a friend to pick her up from the police station." ¶ 106.

At the end of the SAC, prior to listing the causes of action, plaintiffs set forth facts that supposedly justify veil piercing [*see* ¶¶ 117-124][19] and demand futility [*see* ¶ 125]. As discussed herein, only the latter is properly pleaded.

As for the aforementioned 42[20] causes of action, they are, as numbered in the SAC, as follows: (1-2)[21] breach of fiduciary duty and aiding and abetting breach of fiduciary duty; (3-4)

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[19] While plaintiffs might be able to prove that veil piercing is warranted, the SAC, without particularity and in conclusory fashion, parrots the applicable veil piercing factors:

> [Ginza 2, Holding, Management, Saia, Ginza 1, Ginza 3, Gans Mex, Triskonex, and Southwest] (collectively, the "Sergeev Entities") are all owned or controlled by Sergeev. The Sergeev Entities each share addresses, office space and telephone numbers. The Sergeev Entities have substantial overlap between their directors, officers, and personal. Sergeev freely transfers funds from one entity to another for his own purposes and uses each of the Sergeev Entities as a personal piggy bank. Sergeev makes all business decisions for each of the Sergeev Entities, who have no business discretion. There is such unity of interest and ownership that the separate personalities of the Sergeev Entities and Sergeev no longer exist. To adhere to the doctrine of the corporate entity would promote injustice or protect fraud. As set forth herein, Sergeev has used the Sergeev Entities' to carry out unlawful acts and limit himself from liability in effect defeating the "ends of justice". The corporate arrangement was a sham, used to defeat justice and to perpetrate fraud.

SAC ¶¶ 117-124 (paragraph numbering omitted). Plaintiffs' opposition brief does not provide further material detail. *See* Dkt. 128 at 20. Leaving aside the oddity of seeking to pierce the corporate veils of entities in which plaintiffs have an interest, plaintiffs may seek leave to replead their veil piercing claims after discovery, which will be robust enough for them to ascertain whether a bona fide basis for veil piercing exists. Plaintiffs are reminded of the oft overlooked, but well settled rule that the law of the state of a company's incorporation governs a claim to pierce its corporate veil. *See Flame S.A. v Worldlink Int'l (Holding) Ltd.*, 107 AD3d 436, 438 (1st Dept 2013).

[20] While the last cause of action is labeled as the 41st, as noted herein, there are two causes of action labeled as the 33rd, the latter of which is referred to as 33A.

conversion and aiding and abetting conversion; (5-6) fraud and aiding and abetting fraud; (7-8) equitable accounting; (9-10) violation of New York Debtor and Creditor Law (DCL) § 273; (11-12) violation of DCL § 274; (13-14) violation of DCL § 275; (15-16) violation of DCL § 276; (17-18) violation of DCL § 276-a; (19-20)[22] breach of fiduciary duty and aiding and abetting breach of fiduciary duty; (21-22) conversion and aiding and abetting conversion; (23-24) equitable accounting; (25-26) fraud and aiding and abetting fraud; (27-28) declaratory judgments regarding the discussed transfers of plaintiffs' interest in Ginza 2 and Saia;[23] (29) breach of contract and aiding and abetting breach of contract (the latter of which the court interprets to be a claim for tortious interference with contract),[24] asserted directly by Brunetti against Saia and Sergeev for nonpayment of her 8% management fee; (30) breach of contract, asserted directly by

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[21] Except for the 6th cause of action (asserted directly by both Brunetti and Project), the 1st through 18th causes of action are listed in pairs because they are identical claims that are separately asserted directly by Project and derivatively by Project on behalf of Ginza 2 against: Sergeev, Dzerneyko, Kvartskheliya, Management, Bykov, Protax, Gans Mex, Ginza 1, Ginza 2, and Ginza 3. In their opposition brief, plaintiffs clarified that, obviously, Project is not suing Ginza 2 (and certainly not on a cause of action brought on Ginza 2's behalf, i.e., Ginza 2 is not suing itself), and that Ginza 2 is merely named as a nominal defendant. The same is true of the causes of action asserted by Project (Brunetti's company), where Project is erroneously listed as a defendant (e.g. the fifth cause of action). Plaintiffs' counsel is admonished for this sloppy pleading, particularly since this is their third pleading.

[22] The 19th through 26th causes of action are listed in pairs because they are identical claims that are separately asserted directly by Brunetti and derivatively by Brunetti on behalf of Holding against: Sergeev, Saia, Holding, Triskonex, Southwest, Bykov, and Protax. As with Ginza 2, plaintiffs have clarified that Holding is only sued as a nominal defendant.

[23] These causes of action, and the proper parties thereto, do not warrant meaningful discussion due to defendants' admission that no such transfers occurred.

[24] In any event, tortious interference in this context is incongruous. The issue simply is who was obligated, contractually, to pay the alleged amounts owed.

Brunetti against Sergeev for failure to pay her $10,000 per month salary;[25] (31) breach of fiduciary duty, asserted directly by Brunetti against Sergeev;[26] (32) fraudulent inducement, asserted directly by Brunetti against Sergeev; (33) unjust enrichment, asserted directly by Brunetti against all defendants; (33A)[27] quantum meruit, asserted directly by Brunetti against Sergeev, Ginza 2, Project, Saia, and Holding; (34) contractual indemnification, asserted directly by Brunetti against Sergeev, Ginza 2, and Holding; (35) common law indemnification, asserted directly by Brunetti against Sergeev, Ginza 2, and Holding; (36) promissory estoppel, asserted directly by Brunetti against Sergeev; (37) violation of DCL § 273, asserted directly by Brunetti against all defendants;[28] (38) violation of DCL § 274, asserted directly by Brunetti against all defendants; (39) violation of DCL § 275, asserted directly by Brunetti against all defendants; (40) violation of DCL § 276, asserted directly by Brunetti against all defendants; and (41) violation of DCL § 276-a, asserted directly by Brunetti against all defendants.

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[25] The court disregards the labeling of this cause of action as also one for aiding and abetting; it is clear the claim is only meant to be asserted directly against Sergeev for breach of his personal promise to pay Brunetti's salary.

[26] Again, this cause of action is mislabeled to include a claim for aiding and abetting breach of contract when the claim is clearly only meant to be asserted against Sergeev under a breach of fiduciary duty theory.

[27] As noted earlier, since this cause of action is mislabeled as a second 33rd cause of action, for ease of reference, this cause of action is referred to as 33A. The court refers to all other causes of action by their given numbers.

[28] The court disregards the portions of the DCL causes of action labeled "aiding and abetting" because no such cause of action exists. In any event, as explained herein, the DCL claims are improperly pleaded for other reasons.

III. Legal Standard

A. Motion to Dismiss

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Summary Judgment

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving

party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

IV. Motion 5 (The Sergeev Movants' Motion to Dismiss & Plaintiffs' Cross-Motion for Partial Summary Judgment and for Sanctions)[29]

As an initial matter, the court rejects the argument that the SAC fails to satisfy the notice pleading requirements of CPLR 3013. As the forgoing discussion of the SAC should make clear, the SAC is flush with detailed factual allegations that put defendants on clear notice of their alleged wrongdoing. The court also rejects the notion that the SAC fails to plead demand futility. *Bansbach v Zinn*, 1 NY3d 1, 9 (2003); *Marx v Akers*, 88 NY2d 189, 193 (1996); see *In re Comverse Tech., Inc.*, 56 AD3d 49, 53 (1st Dept 2008) ("The complaint must allege with

[29] Given the voluminous briefing and causes of action, the court, for the most part, addresses defendants' arguments in the order they are made in their moving briefs.

particularity that '(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction.'"). The SAC alleges, and defendants have not submitted documentary evidence to refute, the fact that Sergeev controls Holding and Ginza 2. Given the allegations made against him in the SAC, which suggests a credible threat of liability and that Sergeev is interested in the challenged transactions, demand would be futile.

To the extent the SAC asserts veil piercing claims, as noted earlier, they are conclusorily pleaded and, therefore, are dismissed without prejudice with leave to replead after discovery.[30] *See Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 (1st Dept 2006) ("The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil"); *see also TNS Holdings, Inc. v MKI Secs. Corp.*, 92 NY2d 335, 339 (1998) ("Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance.").

The SAC's claims concerning a transfer of Holding's membership interest in Saia are dismissed because defendants admit that Holding's interest in Saia was not transferred to anyone and that "Holding continues to own its 20% membership interest in Saia." *See* Dkt. 90 at 15.[31]

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[30] The claim that Saia breached its contractual obligation to pay Brunetti's management fee requires a veil piercing claim to hold Sergeev personally liable for this obligation. By contrast, the contractual obligations which Sergeev allegedly personally promised to fulfill (e.g., payment of Brunetti's Ginza 2 compensation) do not require a veil piercing claim to hold Sergeev liable (i.e., he is a contracting party) and survive dismissal.

[31] Since defendants are successfully procuring dismissal of these claims, this admission has judicial estoppel effect. *See Wells Fargo Bank N.A. v Webster Bus. Credit Corp.*, 113 AD3d 513, 516 (1st Dept 2014).

The court need not rule on the timeliness of plaintiffs' breach of fiduciary duty claims because no such claim is properly pleaded. The fiduciary duty claims asserted against Ginza 1, Ginza 2, and Ginza 3 are dismissed because an LLC does not owe fiduciary duties to its members. *See Kleinerman v 245 E. 87 Tenants Corp.*, 105 AD3d 492, 493 (1st Dept 2013). Rather, unless such duties are disclaimed in the LLC's operating agreement (which is not the case here because the operating agreements are not in the record), the LLC's **managing member** owes fiduciary duties to the other members. *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014); *Chiu v Chiu*, 71 AD3d 621, 623 (2d Dept 2010) ("[defendant], as the managing member of the LLC, owed a fiduciary duty to the plaintiff"); *see also Kalikow v Shalik*, 43 Misc3d 817, 824 (Sup Ct, Nassau County 2014) ("New York case law is replete with cases demonstrating that a managing member of an LLC has a fiduciary duty to other members of the LLC") (collecting cases).

Nonetheless, the SAC is devoid of any allegation that the loans made to Sergeev's other business amounted to a breach of Sergeev's duty of loyalty. Brunetti does not claim to have objected to these loans; she must have consented to them since it was she who transferred the money. The only reasonable inference that may be drawn from the SAC is that the parties' course of conduct permitted loans to affiliated entities. Even if Ginza 2's operating agreement (which, as noted, has not been produced) does not disclaim the duty of loyalty [*see Kagan v HMC-New York, Inc.*, 94 AD3d 67, 72-73 (1st Dept 2012)], New York law permits interested transactions to be ratified by disinterested equity holders. *Irene David Realty, Inc. v Moyal*, 107 AD3d 430, 431 (1st Dept 2013); *Bd. of Managers of Soho Greene Condo. v Clear, Bright & Famous LLC*, 106 AD3d 462, 463 (1st Dept 2013); *see In re Kenneth Cole Prods., Inc.*, 27 NY3d 268, 278 (2016).

That said, the question of whether the loans may give rise to claims for breach of fiduciary duty is academic. At best, the fiduciary duty claims are duplicative because Brunetti (both directly on her personal loan and derivatively on the restaurants' loans) has stated claims for breach of contract because the loans were not repaid.[32] *See Kaminsky v FSP Inc.*, 5 AD3d 251, 252 (1st Dept 2004) ("[the] claim for breach of fiduciary duty fails to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties and is thus duplicative."). Likewise, the conversion claims are duplicative. *See Sebastian Holdings, Inc. v Deutsche Bank, AG*, 108 AD3d 433 (1st Dept 2013).

Nor is the allegation that Sergeev transferred 25% of the $2 million initial investment in Ginza 2 pleaded with sufficient detail to state a claim for breach of fiduciary duty.[33] The precise dates of the transfers (which shall be ascertained through discovery) impact the timeliness of the claims given that most of the period "between 2008 and 2009" occurred prior to November 23, 2009 (i.e., six years before this action was commenced). It also is not clear from the SAC whether such transfers were meant to be treated as loans (a fact that may well bring the claims within the statute of limitations if repayment was not due until after November 23, 2009). Simply put, it is in plaintiffs' interest to carefully replead this claim with the benefit of discovery.

The accounting claims are properly pleaded against Sergeev for each of the LLCs in which plaintiffs have membership interests. It is well settled New York law that a fiduciary, such as Sergeev, must provide an accounting where such a demand has been made by a non-controlling LLC member. *Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 213-14 (1st Dept

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[32] The proper interest rate may be a question of fact, but the principal is at least subject to repayment of statutory 9% prejudgment interest.

[33] One would imagine the investors who contributed the $2 million would be the most aggrieved; the SAC does not discuss them, and it is unclear if they know what happened to their money.

1990); *see Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 (1st Dept 1997) (same). Defendants do not proffer any valid argument about why plaintiffs are not entitled to an accounting, particularly here, where misconduct is alleged. Therefore, the court grants partial summary judgment to plaintiffs and, as set forth below, orders an accounting to be provided in tandem with discovery.[34]

The fraud claims, whether pleaded as direct or derivative claims, are not viable.[35] The direct claims are premised on Brunetti leaving her old job to work for the restaurants based on Sergeev's promise to fulfill the alleged oral agreement. These promises were made in 2007 and, therefore, any fraud claim based on these promises are time-barred. CPLR 213(8) (6-year statute of limitations or 2 years from discovery); *see Sargiss v Magarelli*, 12 NY3d 527, 532 (2009). In any event, the claim is based on nothing more than the allegation that Sergeev never intended to keep his promise, an allegation made without facts permitting a reasonable inference of scienter. *See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009) ("CPLR 3016(b) is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct.") *Aozora Bank, Ltd. v J.P. Morgan Secs. LLC*, 144 AD3d 440, 441 (1st Dept 2016) (complaint

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[34] As discussed at the preliminary conference, a books and records production is different than (and not a substitute for) an accounting. Counsel is assumed to understand the legal requirements of a fiduciary's accounting and the process by which objections are to be made. The only caveat, as directed below, is that plaintiffs' deadline to file objections to the accounting is 60 days after the close of fact discovery.

[35] The paucity of plaintiffs' defense of these claims (and many of the others) is notable [*see* Dkt. 128 at 24 ("Here, [plaintiffs] adequately alleged the elements of fraud. First, Plaintiffs alleged that Seregeev intentionally made material misrepresentations to Brunetti upon which Plaintiffs justifiably relied and that Sergeev damaged Plaintiffs by, among other things, fraudulently engaging in unlawful transfers of assets belonging to Plaintiffs.")], especially given the extensive efforts that went into pleading so many detailed facts. Plaintiffs' counsel is urged to be as fastidious with the law as the facts, as focusing exclusively on the latter will not guaranty recovery. As noted, there appears to be a meritorious case here, but it must be properly pled (i.e., statement of present, material fact; falsity; scienter; justifiable reliance, and damages caused by the fraud).

must include "sufficient facts to support the reasonable inference of fraud and scienter."); *see also Cronos Group Ltd. v XComIP, LLC*, 2017 WL 4125643, at *10 (1st Dept Sept. 19, 2017) ("where a fraud claim is based upon an alleged false promise, the plaintiff is required to plead specific facts from which it may be reasonably inferred that the defendant did not intend to keep the promise when it was made.").[36]

The promissory estoppel claim is dismissed because plaintiffs have stated a claim for breach of contract. This quasi contract claim is trumped by the contract. *Coleman & Assocs. Enterprises, Inc. v Verizon Corp. Servs. Group, Inc.*, 125 AD3d 520, 521 (1st Dept 2015), citing *Susman v Commerzbank Capital Markets Corp.*, 95 AD3d 589, 590 (1st Dept 2012) ("such a claim cannot stand when there is a contract between the parties.").

Turning now to Dzerneyko, the claims asserted against him, styled principally as aiding and abetting breach of fiduciary duty, are dismissed without prejudice. Dzerneyko is alleged to have behaved deplorably, but he is not actually alleged to have done anything to substantially assist in Sergeev's wrongdoing that caused harm to plaintiffs. He is not allegedly the reason Brunetti was not paid or why the loans were not repaid. That, according to the SAC, was Sergeev's doing. While Dzerneyko now may be in charge of the companies' finances, he, personally, is not responsible for repaying the money. Nonetheless, while the claims against Dzerneyko are dismissed without prejudice, he will be subject to discovery as an agent of Ginza 2 and Sergeev. If he indeed was involved in anything wrongful, such as, for instance, Brunetti's mail being tampered with or her involvement in the businesses being misrepresented to regulatory agencies (i.e., regarding the liquor licenses), plaintiffs may amend to add him back to

[36] It is unclear why Brunetti would want to seek rescission, rather than enforce the parties' alleged agreement, as her promised compensation appears to be far more lucrative than what she would have earned had she remained employed by Burlington Coat Factory.

this case. If any allegation of aiding and abetting is alleged against him, of course, the elements of knowledge and substantial assistance must be alleged. *See Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 (1st Dept 2009). For now, since the SAC is devoid of any specific alleged wrongdoing on his part that resulted in damages, the claims against Dzerneyko are dismissed.

As for the DCL claims, they are all dismissed. The foundation of any DCL claim is a conveyance made without fair consideration. DCL § 273; *see generally Wimbledon Financing Master Fund, Ltd. v Bergstein*, 2017 WL 3024254, at *4-5 (Sup Ct, NY County 2017). The subject conveyances were allegedly made as loans, and, therefore, the existence of seemingly fair consideration precludes the maintenance of a DCL claim. To the extent plaintiffs' review of the financial discovery reveals facts that would permit an allegation of conveyances made without fair consideration and/or the insolvency of a transferee,[37] they may seek leave to amend. However, the SAC's conclusory claims that the terms of the loans were so unfair so as to result in there being inadequate consideration and the supposed insolvency of Sergeev's other entities (a fact plaintiffs are not in a position to allege without discovery) are insufficient.

Next, while Brunetti has stated a claim that the alleged oral agreement was breached, Brunetti's claims for all amounts payable prior to November 23, 2009 are dismissed as time

[37] The most potentially plausible DCL claim is the diversion of 25% of the outside investors' money meant to be provided to Ginza 2, whose purpose and justification should be revealed through discovery. However, the claim would have accrued at the time of the transfers (exact dates are not alleged and appear likely to have occurred before November 23, 2009) and, thus, may be time barred. *See Miller v Polow*, 14 AD3d 368 (1st Dept 2005), citing *Avalon LLC v Coronet Props. Co.*, 306 AD2d 62, 63 (1st Dept 2003) ("[plaintiff's causes of action [under the DCL] should have been dismissed because the purported fraudulent conveyance [occurred] more than six years prior to commencement of this action"); *see also Jaliman v. D.H. Blair & Co.*, 105 AD3d 646, 647 (1st Dept 2013) (two year discovery rule [*see* CPLR 213(8)] only applies to claims for actual fraud; "a claim for constructive fraud is governed by the six-year limitation set out in CPLR 213(1), and [] such a claim arises at the time the fraud or conveyance occurs."), quoting *Wall St. Assocs. v Brodsky*, 257 AD2d 526, 530 (1st Dept 1999).

barred; claims for all amounts due thereafter are timely. CPLR 213(2); *see ACE Secs. Corp. Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 594 (2015). The same is true of Brunetti's quantum meruit and unjust enrichment claims. *See Hakim v Hakim*, 99 AD3d 498, 502 (1st Dept 2012) ("Insofar as the quantum meruit and unjust enrichment claims are asserted against the LLC, the motion court properly determined that these claims are not time-barred to the extent they seek recovery for services [plaintiff] allegedly performed within the six years before he commenced this action."). Brunetti may, at this juncture, maintain quantum meruit and unjust enrichment claims given the parties' disputes over what she is contractually owed for her alleged extensive services. *See Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 439 (1st Dept 2014). While the claim may ultimately fail if Brunetti prevails on her contact claims [*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987)], defendants' challenges to the alleged oral agreement permits Brunetti to plead quantum meruit and unjust enrichment in the alternative.[38]

Brunetti's contractual indemnification claim is dismissed. While she deserves to be repaid any liabilities she incurred on behalf of the LLCs (e.g., their unpaid taxes), she does not allege the existence of any contract affording her such indemnification rights. Nonetheless, she has stated a claim for common law indemnification. *See McCarthy v Turner Const., Inc.*, 17 NY3d 369, 375 (2011) ("common law "indemnity is a restitution concept which permits shifting

[38] It also should be noted that unrecompensed labor may give rise to a non-duplicative quasi contract claim where the failure to provide compensation would result in unjust enrichment. *See Almeciga v Ctr. for Investigative Reporting, Inc.*, 185 FSupp3d 401, 413 n.3 (SDNY 2016) (Rakoff, J.) (noting that "some lower New York courts have noted in dicta that ... "seemingly duplicative unjust enrichment claims are only allowed when the plaintiff actually performed services for which it is equitably entitled to compensation (e.g. a situation of detrimental reliance) or where it seeks to recover its related out-of-pocket expenses."), quoting *Komolov v Segal*, 40 Misc3d 1228(A), at *4 (Sup Ct, NY County 2013), *aff'd* 117 AD3d 557 (1st Dept 2014), accord *Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 503 (1983).

the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other."). The SAC permits a reasonable inference, for instance, that Sergeev would be unjustly enriched by not having to pay taxes and other liabilities owed by the LLCs which were either personally guaranteed or paid by Brunetti.

The declaratory judgment claims are dismissed as duplicative of the breach of contract claims, which are sufficient to afford plaintiffs the relief they seek. *See Cherry Hill Market Corp. v Cozen O'Connor P.C.*, 118 AD3d 514, 515 (1st Dept 2014), citing *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 (1st Dept 1988) ("A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract.").

Finally, while, as noted earlier, the court will not sanction defendants for the inadequate search described in Sergeev's September 19, 2016 affidavit, they are cautioned that this court has no patience for obstinate, incorrigible litigants, and will not hesitate to impose sanctions if the court's discovery orders are not complied with. *See Herman v Herman*, 134 AD3d 442 (1st Dept 2015). Sanctions will be back on the table if, for instance, the ordered books and records and accounting are not timely provided. Plaintiffs have been kept in the dark for far too long.

V. Motion 6 (Holding's Motion to Dismiss)

This motion is granted to the extent that all causes of action asserted against Holding are dismissed. Plaintiffs concede that, notwithstanding the confusing way in which Holding is named in many of the causes of action, Holding is only sued in this action as a nominal defendant. Dkt. 128 at 19 n.4; *see Summer v Ruckus 85 Corp.*, 150 AD3d 515 (1st Dept 2017), citing *Tobias v Tobias*, 192 AD2d 438, 440 (1st Dept 1993) ("a corporation is ordinarily an indispensable party in a derivative suit."). The caption in the amended pleading (that plaintiffs

are directed to file below) shall make this clear. *See, e.g., Shawe v Cushman & Wakefield*, Index No. 652664/2016, Dkt. 15. Holding remains a party to this case, and its counsel must be present at all court appearances.

VI. Motion 7 (Southwest's Motion to Dismiss)

Southwest's motion to dismiss is granted. The claims asserted again it are predicated on the allegation that on "October 25, 2013, Dzerneyko prepared documents on behalf of Holding which purported to transfer Holding's membership interests in Saia to Southwest and to resign from its position as manager of Saia." *See* Dkt. 135 at 8. Brunetti "refused to sign these documents" and, as the other defendants concede, "Holding continues to own its 20% membership interest in Saia." *See id.* at 7-8.

VII. Motion 8 (Bykov's & Protax's Motion to Dismiss)

These accountant defendants are not alleged to have caused any harm to Ginza 2 or Holding. They, to be clear, are not alleged to have received any alleged fraudulent transfers. While they may have refused to handle the companies' taxes in the manner preferred by Brunetti and refused to give her books and records access, the only reasonable reading of the SAC is that they did so at Sergeev's directions, which they, as his agent, were bound to follow. Brunetti has stated a claim against Sergeev for this alleged malfeasance, and is being given access to the documents she has demanded from Bykov and Protax. The claims against Bykov and Protax are dismissed (but they, like Dzerneyko, may still be subject to discovery and, perhaps, repleading).

VIII. Motion 9 (Gans-Mex's Motion to Dismiss)

Plaintiffs have stated a breach of contract claim against Gans-Mex for failure to repay a $1.4 million loan from Ginza 2. Its only alleged wrongdoing is failure to repay this loan. All

other claims asserted against it are dismissed as duplicative and for failure to allege any other wrongdoing. Accordingly, it is

ORDERED that defendants' motions to dismiss are granted in part in accordance with this decision, and within two weeks of the entry of this order on NYSCEF, plaintiffs shall file a a third amended complaint that clearly designates Holding as a nominal defendant and which shall only contain the following causes of action: (1) a direct claim for breach of contract by Brunetti against Sergeev and Ginza 1; (2) a derivative cause of action for breach of contract by Project on behalf of Ginza 2 against Sergeev, Ginza 1, and Gans-Mex; (3) a direct claim for unjust enrichment by Brunetti against Sergeev; (4) a direct claim for quantum meruit by Brunetti against Sergeev; (5) a direct claim for common law indemnification by Brunetti against Sergeev; (6) a derivative claim for equitable accounting by Brunetti on behalf of Project and Holding against Ginza 1, Ginza 2, Ginza 3, and Saia; and (7) a direct claim by Brunetti against Sergeev for an equitable accounting of Holding; and it is further

ORDERED that the remaining defendants shall file an answer to the third amended complaint within two weeks of its filing on NYSCEF; and it is further

ORDERED that the dismissal of the causes of action issued herein is without prejudice to plaintiffs moving for leave to amend if discovery provides a basis for doing so; and it is further

ORDERED that plaintiffs' cross-motion for sanctions is denied; and it is further

ORDERED that plaintiffs' cross-motion for partial summary judgment on their accounting claims is granted to the extent that for the period November 23, 2009 to the date of this decision, Sergeev must, within 60 days of entry of this order on NYSCEF, e-file separate accountings of Holding, Ginza 1 (but only if plaintiff have a direct or indirect equity interest in

it), Ginza 2, and Ginza 3, and plaintiffs must file objections to the accountings within 60 days of the close of fact discovery.

Dated: September 28, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C